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## **UCLA Pacific Basin Law Journal**

### **Title**

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### **Permalink**

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### **Journal**

UCLA Pacific Basin Law Journal, 20(1)

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### **Publication Date**

2002

### **DOI**

10.5070/P8201022155

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# ARTICLES

## ***LEX REX OR REX LEX?* COMPETING CONCEPTIONS OF THE RULE OF LAW IN SINGAPORE**

Li-ann Thio\*

If the government had failed to establish the basics for political stability and social cohesion, the Rule of Law would have become an empty slogan in a broken-backed Singapore. But we have succeeded, and the Rule of Law today in Singapore is no cliché.

—*Prime Minister Lee Kuan Yew, 1990*<sup>1</sup>

Despite the trappings, the Rule of Law in Singapore today has given way to empty legalism.

—*International Human Rights Committee of the  
New York City Bar Association, 1991*<sup>2</sup>

### I. INTRODUCTION

#### A. THE RULE OF LAW AS CERTAINTY AND/OR JUSTICE: BETWEEN FORM AND SUBSTANCE

While the Rule of Law is not formally enshrined in the Singapore constitution's text, it has through practice entered Singapore's constitutional and political lexicon. In opposing political absolutism, it avers that no man is above the law and the law's supremacy (*lex rex*) in contradistinction to the rule of man (*rex*

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1. Prime Minister Lee Kuan Yew, Speech at the Opening of the Singapore Law Academy (Aug. 31, 1990), in 2 S Ac LJ 155, 156 (1990).

2. Beatrice S. Frank et al., *The Decline of the Rule of Law in Malaysia and Singapore Part II – Singapore, A Report of the Committee on International Human Rights of the Association of the Bar of the City of New York*, 46 THE RECORD 7, 17 (1991) [hereinafter, NEW YORK BAR RECORD].

lex).<sup>3</sup> It has been the subject of Singapore parliamentary debates, ministerial statements, media discussions and judicial pronouncements.

However, the ambiguity dogging this powerful legitimating idea, a “notoriously contested concept”<sup>4</sup> in other jurisdictions, is also evident in Singapore. The contest is essentially polarised between formal (“thin”) and substantive (“thick”) conceptions of the Rule of Law.<sup>5</sup> The former considers the Rule of Law as autonomous from theories of justice or political morality, drawn from virtues inherent in the concept of “law” itself.<sup>6</sup> Rules are assessed through “content-independent” evaluative criteria,<sup>7</sup> (clarity, generality, accessibility, prospectivity, certainty). Thus, jurisprudential bias towards the idea of “law” itself determines how the term is deployed as a plumb-line of good government.<sup>8</sup>

A ‘substantive’ or dynamic conception engages substantive justice theories,<sup>9</sup> which precipitates controversy. In speaking qualitatively to a state’s economic system, political ideology or human rights practice,<sup>10</sup> this broader conception may encompass

3. Samuel Rutherford authored *LEX REX: or The Law and the Prince* in 1664, (1982 ed.) which England and Scotland banned upon publication. It advocated lawful resistance against tyranny, based on the premise that the Law, identified as divine law, was supreme. A monarch or government could be legitimately disobeyed if it disregarded the Law. This concept flows from the idea of a higher law antecedent to and binding upon the contemporary government which made law. Similarly, Sir Edward Coke opposed James I’s belief that a king ruled by divine right and established prerogative courts to implement his will. He asserted that judges must follow the common law, asserting that “*Quod Rex non debet esse sub homine sed sub Deo et Lege*” (The King should not be under man, but under God and the Law). See *Prohibitions Del Roy*, 77 Eng. Rep. at 1343. In *Dr. Bonham’s Case* (1609) 8 Co. Rep. 107 at 118a, Sir Coke affirmed that the “common law will control acts of Parliament” and adjudge them as void where acts are “against common right or reason or repugnant or impossible to be performed.” This reflects the distinction between law as reason and as power in western legal thought.

4. Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, 15 *LAW & SOC. INQUIRY* 633, 633-63 (1990).

5. Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, *PUBLIC LAW* 467-87 (1997).

6. What Lon Fuller, who identified eight features that ground a legal system, termed the “inner morality of law” which gave “law” its distinctive features. H.L.A. HART, *THE CONCEPT OF LAW* 202 (Oxford University Press 1961). (1961).

7. John Gardner, *Legal Positivism: 5 ½ Myths*, 46 *AM. J. JURIS.* 199, 207 (2001).

8. Legal positivists like Joseph Raz prefer a “thin” conception of the Rule of Law to preserve the idea’s coherence and determinacy. To Raz, the Rule of Law’s virtue is essentially negative, designed to prevent the arbitrary exercise of power, protecting liberty and human dignity against unclear, unstable and retrospective laws. See Joseph Raz, *The Rule of Law and its Virtue*, 93 *L.Q.R.* 195, 195-211 (1977).

9. Thus, there arises the problem of subjectivity inherent in the appropriation of the “Rule of Law” by any political ideology of choice.

10. See, for example, the definition adopted by the International Commission of Jurists in 1959 at a Conference in Delhi of the Rule of Law as a dynamic concept which should not only “advance the civil and political rights of the individual in a free society, but also. . . establish social, economic, educational and cultural condi-

a wide range of political virtues, blurring the law/politics dichotomy.<sup>11</sup>

The mere legalism engendered by the formal, order-based version is considered deficient as it could mean that authoritarian regimes promulgating unjust laws through correct legal procedures could be considered to act consistently with the Rule of Law.<sup>12</sup> The law's content could not be evaluated by any higher order norms or natural law principle committed to an ethical or "rights-based"<sup>13</sup> conception of law. The dilemma is captured thus: "while the Rule of Law is more than the rule of the law, it must be less than the rule of good law."<sup>14</sup>

Furthermore, what the Rule of Law entails is obfuscated by the concept's close associations with the politically charged concepts of constitutionalism,<sup>15</sup> human rights,<sup>16</sup> and democracy.<sup>17</sup> A

tions under which his legitimate aspirations and dignity may be realised." INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW AND HUMAN RIGHTS: PRINCIPLES AND DEFINITIONS* 66 (International Commission of Jurists 1966).

11. Critical Legal Scholars would deride the fiction of law's autonomy from politics, as law is a tool to legitimate existing power structures and inequities. Law cannot be divorced from its underlying political philosophy. See, e.g., ROBERTO UNGER, *LAW IN MODERN SOCIETY* 176-81, 192-223 (Free Press ed., 1976); Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *Yale L.J.* 561 (1977) (reviewing EP THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975) Duncan Kennedy, *Legal Formality* 2 *J. LEGAL STUD.* 351-98 (1973). This reinforces RJ Rushdoony's observation that "Every system of thought is at heart religious and begins with a religious, ultimate principle which is the source of power and authority": LAW AND SOCIETY: VOLUME II OF THE INSTITUTES OF BIBLICAL LAW 519 (1986).

12. Kazimierz Opalek, *The Rule of Law and Natural Law* in *SELECTED PAPERS IN LEGAL PHILOSOPHY* 95 (J. Wolenski ed., 2000) (where he discusses the dilemma of two possible faulty solutions in the naturalist and positivist approach, as "the only way of escaping formalism leads to natural law").

13. Dworkin has suggested a substantive "rights-based" conception (as opposed to a "rule-book" conception) of law, which assumes that citizens are subject to judicially enforceable political and moral laws. Hence, in the absence of clear laws, judges are to make political judgements by referencing a community's political and legal culture rather than making historical enquiries into the law-makers' original intentions: RONALD DWORGIN, *A MATTER OF PRINCIPLE* 2 (Harvard University Press 1985).

14. Jeffrey Goldsworthy, *Legislative Sovereignty and the Rule of Law* in *SCEPTICAL ESSAYS IN HUMAN RIGHTS* 61, 65 (T. Campbell et al. eds., 2001).

15. See generally CL Ten, *Constitutionalism and the Rule of Law*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 394, 394-403 (Robert E. Goodin & Philip Petit eds., 1993).

16. Human rights guard against the arbitrary exercise of discretion or abuse of power through justiciable individual entitlements and by guiding policy formulations, thereby limiting state power.

17. The Rule of Law bears a close historical affiliation with liberal democratic political orders, sharing the purpose of limiting government through electoral accountability. Arguably, failing to develop pluralist and representative democratic structures inhibits the development of a strong Rule of Law as authoritarian executives will disallow meaningful checks through judicial review or parliamentary scrutiny: J. Reitz, *Constitutionalism and the Rule of Law: Theoretical Perspectives*, in

few examples may serve as a preliminary orientation into the nature of the contest and the contestants engaged in articulating the dominant and secondary conceptions of the Rule of Law in Singapore.

## B. THE CONTEST IN CONTEXT

In November 1995, the Attorney General publicly rebuked the Law Society for failing to defend Singapore's legal system and judiciary against a barrage of foreign criticism impugning the inability to get a fair trial in Singapore.<sup>18</sup> He stated that if the Law Society wanted to collaborate in Singapore's development, it must "[B]elieve and accept a concept of the Rule of Law which should not be substantially different from that understood and accepted by the government of the day."<sup>19</sup> Furthermore, it was not enough for the Law Society

[T]o exhort its members to maintain the Rule of Law without a clear understanding of what it conceives to be the necessary conditions that make it possible for the Rule of Law to exist and thrive in Singapore . . . Its belief and understanding should accord substantially with what the people or their elected representatives believe should be the Rule of Law that is relevant to Singapore.<sup>20</sup>

The Attorney General thus identified the Rule of Law as an idea embedded in the local politico-cultural context, not a universal legal principle. The Law Society President replied that the on-going English debate about balancing the principles of parliamentary supremacy<sup>21</sup> and the Rule of Law warranted reconsideration in Singapore.<sup>22</sup> While not elucidating the Rule of Law's content, this exchange indicates competing understandings.

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DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 111, 126 (Robert D. Grey ed., 1997).

18. The AG's Four Examples, STRAITS TIMES (SING.), NOV. 18, 1995 at 27. These related to the following cases: *Fay v PP* [1994] 2 SING. L. R. 154; *Contemplation v PP* [1994] 3 SING. L. R. 834; *AG v Lingle*, [1995] 1 SING. L. R. 696, and the *Rajan Pillai* case: [1995] 3 SING. L. R. 157; [1996] 2 SING. L. R. 97, C.A. (C.A.).

19. *Law Society Failed to Defend Legal System: A-G*, STRAITS TIMES (SING.), NOV. 18, 1995, at 1.

20. *Id.* See also *Law Society Explains its Reasons for Silence*, STRAITS TIMES (SING.), NOV. 27, 1995, at 3; *Law Society Council to Discuss AG's Comments*, STRAITS TIMES (SING.), NOV. 19, 1995, at 33.

21. Yash Ghai argues that the British faith in parliamentary sovereignty resulted in their not having "a very specific notion of the Rule of Law": *The Rule of Law and Notions of Justice in the European Context*, in *THE RULE OF LAW AND HUMAN RIGHTS IN MALAYSIA AND SINGAPORE* 13, 16 (Kehmas-s, 1989). However, the Rule of Law within the British context has since evolved and developed a more substantive content. See Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 57 (J. Jowell & Dawn Oliver eds., 1994).

22. Mr. Chandra Mohan asserted that the Rule of Law meant three things to Englishmen, two of which were embodied in the Singapore constitution: that law

The Rule of Law was debated in Parliament upon a motion initiated by veteran opposition MP JB Jeyaretnam in November 1999.<sup>23</sup> These debates reveal two distinct conceptions: the opposition politicians articulated a broader conception that grounded a plethora of claims including alleged breaches of fundamental liberties, discriminatory application of licensing laws,<sup>24</sup> and general allegations of unfairness and undemocratic practices, particularly regarding government treatment of opposing political parties.<sup>25</sup> To them, the Rule of Law extended beyond the judicial process towards ensuring all government branches acted under the law. The contrary government view was that the Rule of Law's culture was "deeply rooted in the public service"<sup>26</sup> and its key tenets established in the legal system:

[T]he Rule of Law refers to the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notions of the transparency, openness and prospective application of our laws, observations of the principles of natural justice, independence of the Judiciary and judicial review of administrative action.<sup>27</sup>

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predominates over power and all are equally subjected to the general law. Straits Times journalist Leslie Fong speculated that this assertion could have stemmed from the discomfit with the AG's assertion that the elected government, through Parliament, stipulated what constituted the Rule of Law, making it a function of political expediency rather than principle. Leslie Fong, *Law Society Chief Could do Better than Talk in Riddles*, STRAITS TIMES (SING.), Jan. 13, 1996, at 35. See also CJ "Mystified" by Law Society Chief's Response to AG's Criticism, STRAITS TIMES (SING.), Jan. 7, 1996, at 21.

23. 71 SING. PARL. REP., Nov. 24, 1999, "Rule of Law" cols. 569ff; 573-634. The original motion moved by JB Jeyaretnam "urges the government to ensure the complete and full compliance of the Rule of Law by all Ministers, officials and public servants." The final motion moved by PAP MP Chin Tet Yung was reformulated thus: "commends the Government for upholding the Rule of Law and ensuring that it is fully observed by all." The House believed the urge was met.

24. Mr. Jeyaretnam listed what he considered to be violations of the Rule of Law, including preventive detention laws, denial of due process rights, denial of bail without adequate reasons, denial of freedoms of speech, assembly and the press, shutting off judicial appeals, restricting the right to ravel and the cancellation of licenses by executive officers without proper judicial inquiry. 71 SING. PARL. REP., Nov. 24, 1999, "Rule of Law" at cols. 577-78, 632.

25. Mr. Chiam See Tong, 71 SING. PARL. REP., Nov. 24, 1999, "Rule of Law" col. 583-84, 629.

26. Associate Professor Chin Tet Yung, 71 SING. PARL. REP., Nov. 24, 1999, "Rule of Law" at col 604. The mission statement of the Attorney-General's Chambers is "To enhance the Rule of Law and constitutional government in Singapore by providing sound legal advice and assistance in developing a fair and responsive legal system, further good public administration and protecting the interest of the state and of the people": available at <http://www.agc.gov.sg>.

27. Associate Professor Ho Peng Kee, 71 SING. PARL. REP., Nov. 24, 1999, "Rule of Law" at col. 592

The government in affirming its commitment to the Rule of Law, and in rebutting contrary criticisms regularly cites laudatory reports praising the Singapore legal framework as facilitating the solidification of Singapore's position as an international commercial and communications centre. For example, the Global Competitiveness Report ranked Singapore first in the world for competitiveness in the past 4 years; the World Competitiveness Yearbook has consistently ranked Singapore first for legal framework.<sup>28</sup> The Rule of Law as facilitator and guarantor of a sound business and investment environment becomes synonymous with law and order, buttressing the view that economic productivity and political stability are closely correlated.

The government's critics, both internal and external, equally insist that the Rule of Law in Singapore is "in decline,"<sup>29</sup> or being systematically "dismantle(d),"<sup>30</sup> that the Singapore system evinces a quality of "legal terrorism."<sup>31</sup> Eliciting robust defensive comments,<sup>32</sup> detractors have characterized the situation as one of the "mis-Rule of Law"<sup>33</sup> or that "the rule of Lee has displaced the Rule of Law" as Singapore judges "know which side of the

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28. Senior Minister Lee Kuan Yew, *Special Millennium Address at the Millennium Law Conference Gala Dinner*, Apr. 11, 2000, Singapore Government Media Release, available at <http://www.gov.sg/sprinter/search.htm>. These accolades are regularly reported in the *Straits Times*. See, e.g., Singapore's Legal System Rated Best in the World: Full Confidence that Justice Will be Fast, Fair STRAITS TIMES (SING.), Sep. 26, 1993, at 3; *Singapore Legal System is Top, Say Investors* STRAITS TIMES (SING.), July 22, 1995, at 3 (in relation to a favourable report by the Hong Kong base Political and Economical Risk Consultancy (PERC)).

29. NEW YORK BAR RECORD, *supra* note 2. The report notes at 16 that in recent years, the government had "taken steps to intimidate dissenters and limit the independence of the judicial system, resulting in the decline in the Rule of Law." This included unleashing preventive detention powers in relation to the 1987 so-called "Marxist Conspiracy," attacks on free speech and the press, restrictive means taken in relation to the bar and bench, which sustained a climate of fear, quenching critical views.

30. ASIA WATCH REPORT, SILENCING ALL CRITICS: HUMAN RIGHTS VIOLATIONS IN SINGAPORE 1 (1989).

31. Attributed to exiled opposition politician Tang Liang Hoong, in *A historic Legal Battle: The Times*, STRAITS TIME, (SING.), Aug. 16, 1997, at 37. See also Francis Seow, *The Politics of Judicial Institutions in Singapore*, available at <http://www.sfdonline.org> (last visited 25 May 2002).

32. For example, two PAP MP's successfully moved a motion regretting that opposition politician Chee Soon Juan agreed with comments made by Francis Seow which attacked the independence and integrity of the Singapore judiciary in 1995.65 SING. PARL. REP., NOV. 2, 1995 cols. 223-44.

33. William Safire, *The misRule of Law: Singapore's Legal Racket*, N.Y. TIMES, June 1, 1997, at 17 (criticizing the use of libel suits against opposition politicians to silence political dissent and bankrupt opponents, with particular reference to the *Tang Liang Hoong v Lee Kuan Yew & Anor* [1998] 1 SING. L. R. 97. Total damages awarded amounted to about Singapore Dollars (SGD) 3.6 million, down from the SGD 7.6m awarded by the High Court, for the defamation of 11 plaintiffs.)

judicial bread is buttered.”<sup>34</sup> These criticisms allege a partial or “compliant judiciary,”<sup>35</sup> the violation of rights and privileges, and the executive misapplication of licensing laws.<sup>36</sup>

This dialogue of critique and rebuttal, while demonstrating that the Rule of Law is deployed in political discourse to erode or buttress government legitimacy, is nevertheless one conducted at cross-purposes: “What human rights groups and international non-governmental organisations criticise is our public law record, meaning things such as constitutional law, criminal law, anything involving the state. They are not concerned with the commercial areas, as our record is very good for dealing with these matters.”<sup>37</sup>

Thus, a dichotomous or “schizophrenic” approach towards the role of law and legal institutions appears to be maintained between commercial law matters and issues relating to social justice, civil society, and individual rights.<sup>38</sup>

### C. THE RULE OF LAW HYBRIDISED? THE SINGAPORE LEGAL SYSTEM AND THE (IN)FUSION OF INFLUENCES

Since legal systems, their institutions, processes, and values are founded and shaped by their legal culture,<sup>39</sup> the values of

34. Attributed to exiled Singaporean critic and former Solicitor-General, Francis Seow, at a William College meeting protesting the conferring on a honorary degree on the Singapore Prime Minister in 1995: *Parliament to Debate Chee Soon Juan Issue*, STRAITS TIMES (SING.), Oct. 30, 1995, at 1. See also Davinder Singh, 65 SING. PARL. REP., 2 November 1995 (Independence and Integrity of Singapore Judiciary) at col. 229.

35. Christopher Lingle, “*The Smoke Over Parts of Asia Obscures Some Profound Concerns*” I.H.T. Oct. 7, 1994. A passage suggesting that intolerant regimes in Asia resorted to court action in reliance on a compliant judiciary to bankrupt opposition politicians was found to refer to the Singapore judiciary and constituted a contempt of court. *AG v Lingle* (1995) 1 SING. L. R. 696. Christie and Roy noted that with “bizarre, Kafkaesque” irony, the Singapore AG claimed that Lingle could only have been referring to Singapore, as there were no other alternatives. THE POLITICS OF HUMAN RIGHTS IN EAST ASIA 65-66 (2001).

36. See J.B. Jeyaretnam, *The Rule of Law in Singapore*, in THE RULE OF LAW AND HUMAN RIGHTS IN MALAYSIA AND SINGAPORE: A REPORT OF THE CONFERENCE HELD AT THE EUROPEAN PARLIAMENT, Mar. 9-10, 1989, at 30-38. He criticizes the lack of adequate workers rights legislation, the power of the Housing and Development Board (HDB) to evict a person without judicial redress, the lack of recognition of the right of peaceful demonstration and the regulatory framework which ensures the muzzling of the local media and punitive powers to punish foreign publications through curtailed circulation.

37. Observation by constitutional scholar Kevin Y.L. Tan reported in “Is S’pore Legal System Getting a Bad Name?”, STRAITS TIMES (SING.), Oct. 25, 1997.

38. See E.K.B. Tan, *Law and Values in Governance: The Singapore Way*, 30 H.K. L.J. 91, 91 (2000).

39. Lawrence M. Friedman defines legal culture as “the values and attitudes which bind the system together and which determines the place of the legal system in the culture of the society as a whole . . . the network of values and attitudes



those who shape that culture, primarily the governing elite, will determine the dominant conception of law and the Rule of Law in a given context.

The study of the Rule of Law in Singapore, the “most occidental of the oriental societies,”<sup>40</sup> which exhibits the pragmatic urge to achieve a “creative synthesis” of “the best of Western Law and Eastern tradition,” is illuminating in various respects.

The English common law was imported into Singapore as British colonial legacy. A Commonwealth member, Singapore still considers its legal system as part of the common law world. The Westminster model of parliamentary government, which is predicated on an adversarial bipartisan system that preserves political accountability through the prospect of political turnover through the electoral process, was similarly transplanted from more temperate to tropical soils. Thus, key features of British constitutionalism were imported, modified by aspects of American constitutionalism, most notably the adoption of a written constitution with a justiciable bill of rights, which frames the Singapore polity. Indeed, the US system of limiting legislative power by a bill of rights has been hailed as “the elevation of the Rule of Law concept to its highest level.”<sup>41</sup>

At Independence, there was a fairly heavy reliance on English legal structures and institutions. Singapore has since essentially retained the British model of law to regulate commercial transactions, to the point of apparent over-reliance.<sup>42</sup> However, there has been a distinct move towards the “indigenisation” (or “sinification”) of the legal system to meet the local context’s peculiar exigencies. This move towards autochthony is perhaps most apparent in the field of public law (criminal law,<sup>43</sup> constitu-

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relating to law, which determines when and why and where people turn to the law . . . or turn away. . .” *Legal Culture and Social Development*, 4 LAW AND SOC’Y REV. 29, 35 (1969)

40. Tommy T.B. Koh, *Revisiting the “Asian Values” Debate*, in THE QUEST FOR WORLD ORDER: PERSPECTIVES OF A PRAGMATIC IDEALIST 356, 358 (Amitau Acharya ed., Times Academic Press, 1998).

41. Paul G. Kauper, *The Supreme Court and the Rule of Law*, 59 MICH. L. REV. 531, 531 (1961). See also Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

42. See ANDREW PHANG, THE DEVELOPMENT OF SINGAPORE LAW: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES 84 (1990). Phang in this seminal work strongly argues for the development of an autochthonous legal system.

43. Michael Hor has criticized the Singapore criminal legal system for being based on a “stark utilitarian calculus.” Michael Hor, *Singapore’s Innovations to Due Process*, a paper presented at the International Society for the Reform of Criminal Law, Conference on Human Rights and the Administration of Criminal Justice, (December 2000, Johannesburg), available at <http://www.isrcl.org/Papers/Hor.pdf>. See also Andrew Phang, *Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore*, 31 MALAY. L. R. 46 (1989). For the gov-

tional law and administrative law), particularly in the experiments with constructing new constitutional institutions and case law. A high-ranking minister observed: "if there are no local roots, the soil will eventually reject what the British transplanted." "Local roots" would aid the common man in loving "the law and the tradition," enhancing societal stability.<sup>44</sup>

These "local roots" relate to the asserted cultural approach towards government and governance, encapsulated in the "Asian values" or "Neo-Confucianist" school of thought propounded by government leaders and consistent with their brand of pragmatism.<sup>45</sup> Given the close historical associations between the Rule of Law, western liberal democracy and free market capitalism, the question is whether the Rule of Law can be sustained or evolve in Singapore, which vigorously espouses its own brand of "Asian democracy" that is limited and illiberal, operating within a *de facto* one party state context that espouses a deferential attitude towards authority.<sup>46</sup> Having being conditioned by the common law, which "served the purpose of making the basic principles of a western view of the Rule of Law understood and appreciated,"<sup>47</sup> the question is whether "Singapore values" are consistent with or repudiate the common law's philosophy which, as a "force for freedom," places the "highest value upon the right of the individual to life, liberty and security." This is particularly important in the light of the "communitarian" model of constitutional adjudication, manifest in cases of the last decade.<sup>48</sup> The question is whether the common law form or "shell" has been retained while denying the power of its pro-individual liberty and

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ernment's view towards criminal justice, see AG S.K.Chan, *Cultural Issues and Crime*, 12 S.A.C.L.J. 1 (2000).

44. B.G. Yeo, *Singapore's Legal System Must Take Best of East and West*, STRAITS TIMES (SING.), Mar. 6, 1994, at 1.

45. Neo-Confucianism is thought to particularly appeal to the majority Chinese group, constituting 77% of Singapore's multi-racial population. However, its espousal has stirred disquiet in other communities, particularly among the Malays: N Balakrishnan, *Value Offer Shares in Confucian Society: Espirit de Core*, FAR E. ECON. REV., Feb. 7, 1991, at 27. See also David Jones, *The Metamorphosis of Tradition: The Idea of Law and Virtue in East Asian Political Thought*, in LAW, SOCIAL SCIENCES AND PUBLIC POLICY: TOWARDS A UNIFIED FRAMEWORK 325-48 (A. Chin & A. Choi eds., 1998).

46. See Daniel Bell *et al.*, TOWARDS ILLIBERAL DEMOCRACY IN PACIFIC ASIA (St. Martin's Press, 1995).

47. L.C. Green, *Native Law and the Common Law: Conflict or Harmony*, 12 MALAY. L. R. 59 (1970).

48. See L.A. Thio, *An i for an I: Singapore's Communitarian Model of Constitutional Adjudication*, 27 (2) H.K. L.J. 152 (1997); L.A. Thio, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam*, SING.J. LEGAL STUD. 240 (1997).

dignity ethos,<sup>49</sup> since the form is a “highly prized” commodity, conferring “a measure of vicarious respectability upon an otherwise oppressive system.” However, a common law deracinated by altering its underlying assumptions deflates into a mere “collection of case law rules on miscellaneous topics which are not yet covered by legislation.”<sup>50</sup> This is tested through evaluating whether the common law continues to significantly influence constitutional matters and due process.<sup>51</sup>

In addition to “Asian values,” state imperatives inform the understood role of the Rule of Law. A recurrent motif in Singaporean political discourse is Singapore’s vulnerability to economic vagaries and the need to remain competitive, or security issues arising from communist insurgents, fundamentalist Islamic terrorism, or internal racial tensions. Thus, there is a tendency to equate the Rule of Law as synonymous with “law and order,” needed to facilitate economic development, modernisation and the nation-building process within a multi-racial society.<sup>52</sup> Singapore’s empirical economic success and transformation into one of Asia’s economic miracles, helmed by a strong government ready to subsume individual liberties to community interests to maintain public order, has been presented as an Asian alternative to law and development,<sup>53</sup> in apparent contradiction to western constitutionalism’s theoretical assumptions about economic growth and constitutional government.<sup>54</sup>

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49. The emphasis on the individual, whether deriving from Judeo-Christian notions of *imago dei* or secularized variants like the Kantian version, is a product of Western civilization. In contrast, “Eastern” traditions like Confucianism focus on filial piety and familial loyalty, and is “wholly different from the inner dynamic and logic of Protestantism, which isolates and separates the individual”: ABERCROMBIE, HILL & TURNER, *SOVEREIGN INDIVIDUALS OF CAPITALISM* 72 (Allen & Unwin, 1986).

50. M.F. Rutter, *The Future of the Common Law*, in *THE APPLICABLE LAW IN SINGAPORE AND MALAYSIA: A GUIDE TO THE RECEPTION, PRECEDENT AND THE SOURCES OF LAW IN THE REPUBLIC OF SINGAPORE AND THE FEDERATION OF MALAYSIA* 575 (1989).

51. Rutter notes, “to the extent that the common law principles upholding the liberty and dignity of the individual have been rejected or altered by a society, to that extent the society has shifted its axis.” *Id.*

52. See generally Philip Pillai, *State Enterprise and Legal Importation and Development*, in *STATE ENTERPRISE IN SINGAPORE: LEGAL IMPORTATION AND DEVELOPMENT* (Singapore University Press, 1983).

53. See Donald Emmerson, *Singapore and the “Asian Values” Debate*, 6 *J. OF DEMOCRACY* 95-105 (1995); Kanishka Jayasuriya, *Understanding “Asian Values” as a Form of Reactionary Modernisation* 4 *CONTEMP. POL.* 77-91 (1998); Beng-Huat Chua, *Arrested Development: Democratization in Singapore*, 15 *THIRD WORLD Q.* 655-68 (1994); Daniel Bell, *A Communitarian Critique of Authoritarianism: The Case of Singapore*, 25 *POL. THEORY* 6-32 (1997).

54. See generally Kevin Y.L. Tan, *Economic Development and Prospects for Constitutionalism*, in *LAW, SOCIAL SCIENCES AND PUBLIC POLICY: TOWARDS A UNIFIED FRAMEWORK* 186-206 (A. Chin & A. Choi eds., 1998).

Singapore thus constitutes an interesting case study as to how understandings of the Rule of Law in an avowedly “Asian” society<sup>55</sup> have been influenced or shaped by the local culture, to the extent it exists and is clearly identifiable.<sup>56</sup>

#### D. STRUCTURE OF ARTICLE

While not pretending to evaluate the prodigious literature<sup>57</sup> on the protean idea of the Rule of Law, this article undertakes a contextualised inquiry into how notions of the Rule of Law have been utilized in Singapore’s constitutional and political discourse. As an abstract principle, the Rule of Law can find expression in a range of constitutional arrangements. This necessitates an understanding of Singapore’s legal history and contemporary politico-legal culture as evident in government policy, institution-building, processes, and case law.

The remainder of this article is structured thus: Part II will provide a brief legal history and institutional framework of Singapore’s evolving system of constitutional government. Part III considers briefly the nature of the economy system and the politico-legal culture that guides governance. Part IV and V examine specific instances where the Rule of Law has been contested in Singapore, as manifested in institutional development, processes, and cases, which should shed light on the dominant and marginal conceptions of the concept, its functional utility, and the state values and imperatives that shape its understanding. Part VI will offer some concluding observations.

## II. SINGAPORE’S LEGAL HISTORY AND INSTITUTIONAL FRAMEWORK

### A. LEGAL HISTORY: RECEPTION OF THE COMMON LAW

Hickling observed that the British East India Company directors might be considered Singapore’s founding fathers, considering its *raison d’être* as a trading centre and British counter to

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55. “Asia” is of course not a distinct monolithic entity, having in one vast geographical region a plurality of religions and ethnic groups, political and economic systems, ideological beliefs, cultures and histories. Professor Onuma Yasuaki writes that “there is no single Asia, there are many Asias” in *In Quest of Intercivilizational Human Rights: Universal v Relative Human Rights viewed from an Asian Perspective* (Occasional Paper No. 2, Centre for Asian Pacific Affairs, 1996, at 1).

56. The problem with the idea of “culture” is that there is no single culture within a state and thus the state cannot espouse a fully representative concept of culture. Furthermore, it is a dynamic concept, prone to both endogenous and exogenous change. See Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFFAIRS 109 (1994); Kim Dae Jung, *Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values*, 73 FOREIGN AFFAIRS 189 (1994).

57. See generally THE RULE OF LAW NOMOS XXXVI (I. Shapiro ed., 1994).

expanding Dutch regional influence.<sup>58</sup> In 1819, Sir Stamford Raffles arrived at the island of some 120 fisher-folk. Thereafter, Singapore developed into a thriving entrepot port. British control over Singapore as part of the Straits Settlement and a Crown Colony lasted until 1959, when it became self-governing. It joined the Federation of Malaysia in 1963 but gained Independence through secession on 9 August 1965.

The common law, imported through the 1823 Charter of Justice, remains the basis of the Singapore legal system.<sup>59</sup>

## B. CONSTITUTIONAL HISTORY

At Independence, the English legal framework was pragmatically retained to maintain the confidence and predictability it inspired, as an incentive to business and financial investment. While there apparently were plans to draft a new constitution to ensure minority protection, considered integral to societal stability, and to facilitate government acquisition of land at economic cost, this was abandoned. It was considered less problematic to carry on with the 1963 state constitution Singapore had as part of the Federation of Malaysia,<sup>60</sup> whose Constitution was itself a product of joint Anglo-Malayan negotiations. Amendments could be made as necessary.<sup>61</sup>

To modify the 1963 state constitution, Lee Kuan Yew initiated the establishment of the 1966 Wee Chong Jin Constitutional Commission whose primary terms of reference related to creating anti-discrimination safeguards and protecting minority concerns.<sup>62</sup> Its recommendations sought to accommodate the various racial groups in a democratic polity, thereby stabilizing the multi-racial immigrant society or "nation by accident."<sup>63</sup> The problems of state survivability were exacerbated by pressing socio-economic problems such as poverty, housing shortages, a high unemployment rate, and immature economic infrastructure,

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58. R.H. Hickling, *The Origins of Constitutional Government in Singapore*, in *ESSAYS IN SINGAPORE LAW* 3 (1992).

59. PILLAI, *supra* note 52, at 23-52.

60. The Republic of Singapore Independence Act (RSIA) made certain provisions of the Malaysian Federal Constitution applicable to Singapore. See Kevin Tan, *The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day*, 1 S Ac LJ 1, 6-17 (1989).

61. Kevin Tan, *The Legalists: Kenny Byrne & Eddie Barker*, in *LEE'S LIEUTENANTS: SINGAPORE'S OLD GUARD* 90 (P.E. Lam & Kevin Tan eds., 1999).

62. *Reproduced in*, KEVIN Y.L. TAN & L.A. THIO, *CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE* (1997).

63. *Quoting* Minister Jayakumar, *NEW YORK BAR RECORD* *supra* note 2, at 25.

accompanied by the destabilizing threats of communism and communalism.<sup>64</sup>

To deal with these problems and the socio-economic imperative of maintaining law and order, a pre-requisite for economic growth, Singapore retained extraordinary colonial era legislation in the form of preventive detention laws.<sup>65</sup> The Wee Recommendations were disregarded in the decision not to entrench the constitutional amendment procedure until 1979, by abolishing the two-thirds majority and requiring only a simple parliamentary majority, making the supreme law as malleable as ordinary legislation.<sup>66</sup> This expedient move allowed the government to easily effect desired constitutional changes. To facilitate land acquisition as part of the economic restructuring strategy, the Singapore constitution adopted a more limited bill of rights than the Malaysian one, conspicuously excluding the Article 13 right to property and “adequate compensation” for state takings. Instead, the Land Acquisition Act (Cap 152) empowered government acquisition of land for public housing and industrial development, thereby centralizing power in the state to be exercised in the community’s interest.<sup>67</sup>

The Singapore constitution, in expressing a distinct identity, departed from Malaysia’s constitution in two primary respects. First, the principle of secularity was affirmed in Singapore, as opposed to the constitutional enshrinement of Islam as the Malaysian Federation’s official religion.<sup>68</sup> Second, the Singapore

64. It was also in a delicate geo-political position, given Indonesia’s mini “cold war” (Confrontation) with Singapore.

65. The Constitution continued to authorise the enactment and application of extraordinary legislation under Part 7 (Special Powers against Subversion and Emergency Powers), including the Internal Security Act. This reflects a high premium on security and order issues.

66. Constitution of Singapore (Amendment) Act of Dec. 22, 1965 (retrospective to Independence Day). Lord Diplock noted that a feature of Westminster Constitutions was these could be amended by the people through their elected parliamentary representatives acting by specified majorities and occasionally, referenda. *Hinds v The Queen* [1976] 2 W.L.R. 366, 374.

67. “We also put communitarian interests over those of the individual, when sea-front land is acquired for reclamation by cancelling the right of individual sea-front owners to compensation for sea frontage.” LEE KUAN YEW, *supra* note 1, at 156.

68. MALAY. CONST. art. 3. The Singapore constitution does not define “Malay” while the Malaysian constitution does. This is evident in the non-conflation of “Malay” with Muslim regarding the article 39A criteria for defining minority Malay candidates for purposes of GRC elections. *See also* Appendix D in KEVIN Y.L. TAN & L.A. THIO, *CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE* 1025, app. D. (1997) [hereinafter, Wee Commission Report]. *See also* Wee Commission Report, para. 35. Contrast this with article 160 of the Constitution of the Federation of Malaysia where “Malay” is defined as “a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom.” Article 15 (religious liberty clause) was formulated distinctly in excluding a constitutional pro-

constitution displayed an egalitarian bent in refusing to recognize special Malay rights underscored by a claimed *bumiputras* (sons of the soil) status. Instead, minority concerns were safeguarded through individual, not group rights.<sup>69</sup> However, Article 152 declares the government's responsibility to care for the interests of "the racial and religious minorities in Singapore," recognizing "the special position of the Malays" as indigenous peoples. A degree of limited legal pluralism is mandated through Article 153, authorizing legislation to regulate Muslim religious affairs. Thus, Malay-Muslims enjoy some degree of cultural autonomy through the Administration of Muslim Law Act (Cap 3), which regulates, for example, personal laws regarding marriage and testamentary disposition. Singapore has also appended reservations to protect these religious and cultural particularities in acceding to UN human rights treaties like the Convention for the Elimination of All Forms of Discrimination Against Women in 1975 (CEDAW).<sup>70</sup>

### C. CONSTITUTIONAL FRAMEWORK

As a former British colony, Singapore retains a legal system that is essentially based on the British legal system, where parliamentary supremacy, the Rule of Law, and common law principles form the pillars of British constitutionalism. Aside from the political check of elections, prior to the advent of the Human Rights Act (2000),<sup>71</sup> the chief limitations on abuses of power included the legal check of judicial review over administrative action, in which the courts apply a heightened degree of review in cases involving fundamental liberties.<sup>72</sup>

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hibition against the propagation of other faiths among Muslims. The Wee Commission Report affirms that Singapore is a "democratic, secular state."

69. See Wee Commission Report, para. 12.

70. See L.A. Thio, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & the Transformative Potential of CEDAW*, 1 SING. J. INT'L & COMP. LAW 278, 299-305 (1997).

71. This allows British citizens to invoke the provisions of the EUR. CONVENTION ON HUM. RTS. AND FUNDAMENTAL FREEDOMS (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, in their domestic courts rather than having to bring cases to Strasbourg. On the rationale and impact of the Human Rights Act, see J. WADHAM ET AL., *BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998* (2nd ed., 2000). For Dicey's view in relation to rights protection, see A.V. DICEY, *THE LAW OF THE CONSTITUTION* 200-02 (1959).

72. See *R. v Home Secretary ex p Khawaja* [1984] 1 A.C. 74, followed in *Re Fong Thin Choo* [1992] 1 SING. L. R. 120 (where Lord Wilberforce indicating that a stricter standard of review should be applied where "issues of personal liberty" were involved).

Singapore retained the essential structure of the Westminster model of parliamentary government<sup>73</sup> that the British bequeathed to their colonial legates, with incipient modifications.<sup>74</sup> Government is organised around the familiar tri-chotomy of powers: the legislature, the executive and the judiciary. All three branches are established under their own separate constitutional chapters via an implicit application of the separation of powers doctrine. In *Cheong Seok Leng v PP*, S.K. Chan, J. declared that the Singapore constitution was “based on the doctrine of the separation of powers (as modified to accommodate the Westminster model of parliamentary government).”<sup>75</sup> Thus, Singapore practices functional rather than a strict institutional separation of powers after the American model allowing certain offices to straddle government branches. For example, presidential consent is needed to enact laws. In England, Parliament may, in its sovereign power, expressly override the Rule of Law principle, although the “moral strictures” of the principle limits deviations like enacting retroactive legislation.<sup>76</sup> Unlike the supreme UK Parliament, the Singapore Parliament is a body constituted under, and deriving powers from, the Constitution.<sup>77</sup>

### 1. Legislature & Executive

Singapore adopted a unicameral legislature based on the “first past the post” electoral system from the outset. A quasi Second Chamber in the form of the Presidential Council on Minority Rights (PCMR)<sup>78</sup> was established to review legislation to guard against laws with “differentiating measures” which in their practical application would be “disadvantageous to persons of any racial or religious community.”<sup>79</sup> However, the PCMR is widely acknowledged to be a weak institution that lacks coercive

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73. For a list of minimal attributes of Westminster constitutions, see W. Dale, “*The Making and Re-Making of Commonwealth Constitutions*” 42 I.C.L.Q. 67-83 (1993) and S.A. de Smith, *Westminster’s Export Models: The Legal Framework of Responsible Government*, 1 J. COMMONWEALTH & POL. STUD. 2-16 (1961).

74. See L.A. Thio, *The Constitutional Framework of Powers in SINGAPORE LEGAL SYSTEM* (Kevin Y.L. Tan ed., 1998) and Kevin Y.L. Tan, *Parliament and the Making of Law in Singapore*, in *SINGAPORE LEGAL SYSTEM* (Kevin Y.L. Tan ed., 1998). See generally KEVIN TAN & L.A. THIO, *supra* note 61.

75. [1988] 2 M.L.J. 481, 487.

76. Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 73 (J. Jowell & D. Oliver eds., 1994).

77. The constitutions of new, multi-racial states may be products of compromise between the various interest groups and constitutional guarantees of minority protection. Thereby, they are protected to some degree from majoritarian politics.

78. SING. CONST. pt. 7. .

79. SING. CONST. art. 68. .



powers. It may make adverse reports but has never done so.<sup>80</sup> Furthermore, its composition is problematic, as PCMR members include the Chief Justice, Prime Minister (PM), senior Cabinet members, the Attorney General and non-government personnel. The Chief Justice could be placed in a difficult position when conducting a judicial review of a law containing a "differentiating measure." Additionally, since the Cabinet drafts most laws, the same people would be checking themselves. This system of "self-regulation" surfaced in subsequent constitutional experiments.

The Executive is composed of a cabinet government headed by the PM as *primus inter pares* and the President as a ceremonial head of state. Following the collective responsibility doctrine, the Cabinet is formally accountable to Parliament. In actuality, the PM controls Parliament through the "Whip" and is buttressed by his political party's maintenance of an overwhelming parliamentary majority. Thus, powers are effectively fused, as Ministers are both executive and legislative members. Political power was further centralised through adopting anti-hopping laws (Article 46), which binds an MP to his political party as his parliamentary seat is contingent on retaining party membership.

Since Independence, the government has conducted a series of constitutional experiments. Two classes of non-elective parliamentarians, the Non-Constituency and the Nominated MP scheme, were introduced to the Legislature in 1984 and 1990, respectively. Furthermore, the electoral system was transformed in 1988. While retaining a nominal number of single member constituencies, the group representation constituencies (GRC) system allows voters to choose a team of 4-6 MPs from a stipulated minority race.<sup>81</sup> In 1991, the Presidency was transformed from a ceremonial figure head into an elected office, vested with minimal supervisory powers over specific government activities. These include custodial powers over financial reserves, key civil servant appointments, and limited supervision over civil liberties.<sup>82</sup>

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80. S.M. Thio, *The Presidential Council*, 1 SING. L. R. 2 (1969); D.S. Marshall, *The Presidential Council*, 1 SING. L. R. 9 (1969).

81. On these developments, see generally L.A. Thio, *The Post-Colonial Evolution of the Singapore Legislature: A Case Study*, SING. J. LEG. STUD. 80, 97-102 (1993); L.A. Thio, *Choosing Representatives: Singapore Does it Her Way*, in *THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION* 57 (G. Hassall & C. Saunders eds., 1997).

82. See generally *MANAGING POLITICAL CHANGE IN SINGAPORE: THE ELECTED PRESIDENCY* (Kevin Y.L. Tan & P.E. Lam eds., 1997).

## 2. *The Judiciary*

A widely accepted Rule of Law institutional requirement is the existence of an independent, accessible judiciary. Some consider this institutional arrangement “the very definition of the Rule of Law,” in contrast with “the partisan administration of law” which perverts and undermines the Rule of Law.<sup>83</sup>

The Judiciary is established by Part VIII of the Constitution. Its text safeguards judicial independence by insulating judges from political pressure, fixing tenure at 65, and guaranteeing against adverse changing of judicial remuneration after appointment.<sup>84</sup> Singapore judges are highly paid. Annual salaries are: Chief Justice (SGD 347,000), Judges of Appeal (SGD 253,200) and Supreme Court Judges (SGD 234,600).<sup>85</sup> Article 93 vests judicial power in the judiciary and practice confirms the power of judicial review.<sup>86</sup> The Supreme Court consists of a permanent 3-member Court of Appeal and a High Court. Subordinate courts are regulated under the Subordinate Courts Act (Cap 321). Among the departures from British practice was the abolition of the jury system.<sup>87</sup> Up until August 8, 1994, the Privy Council was the final court of appeal for civil and criminal cases.<sup>88</sup> Lee Kuan Yew argued before Parliament in March 1967 that this arrangement “allow[s] a review of the judicial process that takes place here in some other tribunal where obviously undue influence

83. R. Dahrendorf, *A Confusion of Powers: Politics and the Rule of Law*, 40 MOD. L. REV. 9 (1977).

84. SING. CONST. art. 98.

85. Judges Remuneration Act (c. 147, § 2(1) (Sing.); Judges Remuneration (Annual Pensionable Salary) Order, Sept. 1, 1994. Government critic Francis Seow notes that on hearing these salaries, a Queen’s Counsel said to him “Is this kind of money a salary or an income of permanent bribery?” Letter from W. Glen How, quoted in Francis Seow, *The Judiciary*, in THE SINGAPORE PUZZLE 118 (Michael Haas ed., 1999). For other perks reportedly received by judges, which significantly increases their remuneration package, including luxury motor vehicles, see Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore*, 28 J. L. SOC’Y 490, 512 (2001).

86. Supreme Court of Judicature Act §18 (Cap 322).

87. Jury trial was imported into Singapore and Malaysia during the colonial era and was abolished in Singapore by 1970. See Andrew Phang, *Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution*, 25 MALAY. L. R. 50 (1983); C.M. Shunmugam & S. Ramankutty, *The Introduction and Development of Trial by Jury in Malaysia and Singapore*, 8 Mal. LR 270 (1966).

88. The reason was primarily that the Singapore legal system had, after 30 years of statehood, attained a sufficient degree of investor confidence so as not to need the “safety net” of the Privy Council. Among the reasons given by the Law Minister before Parliament was that the Privy Council was no longer cognizant of Singapore’s distinct circumstances and that continuing reliance on them would stultify local legal development. Mr Jayakumar, 62 SING. PARL. REP., Feb. 23, 1994 (Judicial Committee (Repeal) Bill), cols. 388-89.

cannot be brought to bear”<sup>89</sup> for retaining the Privy Council as Singapore’s highest court of appeal apparently no longer applied.

The Singapore judiciary enjoys broader judicial powers than English judges who check government powers primarily through administrative law principles. It possesses the power to review legislation and to strike down unconstitutional laws pursuant to the Article 4 supremacy clause, along the lines of the famed US Supreme Court decision in *Marbury v Madison*.<sup>90</sup> As Lord Diplock noted in relation to the Malaysian judiciary (equally applicable to Singapore), judges in the public law field bore “an even greater responsibility” than English judges owing to the “new dimension” in the judicial control of the government which extended to the legislative branch.<sup>91</sup> This power is exercised exceedingly sparingly and never results in an invalidated act.<sup>92</sup> Thus, an extended *ultra vires* doctrine applies in Singapore, mandating the courts to ensure that the legislature acts within constitutional boundaries and administrative bodies, within their statute-derived powers.<sup>93</sup>

In addition, the judiciary is the guardian of Part IV fundamental liberties.<sup>94</sup> Although there is no express constitutional right of access to a judicial remedy, this is accepted in practice.

Under Article 100, introduced in 1994, the President with Cabinet approval may refer a question to an *ad hoc* constitutional tribunal regarding the actual or prospective effect of any constitutional provision. The impetus for this was a disagreement between the government and the President over the scope of a new provision introduced under the newly minted elected presidency scheme. It related to whether the president had the

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89. SING. PARL. REP. ., Mar. 15, 1967, cols. 1294-95. The Singapore Court of Appeal became the highest court of appeal. Interestingly, since 1991, it has not produced any dissenting judgements in the approximately 19 public law cases it has heard.

90. *Marbury v. Madison*, 5 U.S. 137 (1803).

91. Lord Diplock, *Judicial Control of Government*, Second Tun Abdul Razak Memorial Lecture at University of Malaya, Kuala Lumpur (June 4, 1979) in [1979] 2 MALAY. L. J. cxi).

92. To my knowledge, there has only been a single instance when the High Court sought to void a legislative provision (Prevention of Corruption Act) for being unconstitutional, though the decision was later overturned on appeal. See *Taw Cheng Kong v PP* [1998] 1 SING. L. R. 943 (H.C. .); [1998] 2 SING. L. R. 410 (C.A.).

93. For a critical discussion of the *ultra vires* doctrine in England today, see *JUDICIAL REVIEW AND THE CONSTITUTION* (C. Forsyth ed., 2000).

94. This is a fairly modest list of 8 articles that relate to life, personal liberty and criminal process rights (SING. CONST. art. 9); the prohibition against slavery and forced labour (SING. CONST. art. 10); the prohibition against retrospective laws and double jeopardy (SING. CONST. art. 11); equal protection (SING. CONST. art. 12); prohibition of banishment and freedom of movement (SING. CONST. art. 13); the freedom of speech, association and assembly (SING. CONST. art. 14); religious liberty (SING. CONST. art. 15); and education rights (SING. CONST. art. 16).

discretion to withhold assent to certain bills purporting to curtail the presidential powers, or whether, following general Westminster convention, the president had to act on the Cabinet's advice as generally recognized in Article 21.<sup>95</sup> This has been the only constitutional reference thus far, even though in two instances, opposition politician JB Jeyaretnam wanted to ask the tribunal whether the Public Entertainments Act was constitutional,<sup>96</sup> and whether the approval of Parliament and the President was required before the government made a sizeable loan to Indonesia.<sup>97</sup>

Singapore prides itself on having an efficient judiciary that is speedy in terms of case management control and disposition. While generally lauded for its protection of property rights, critics perceive a government bias in handling politically sensitive cases. The UN Special Rapporteur on the independence of judges and lawyers stated that this perception of judicial bias in the Government's favour could stem from "the very high number of cases won by the Government or members of the ruling party in either contempt of court proceedings or defamation suits brought against critics of the Government, be they individuals or the media."<sup>98</sup> Typically, the allegations are framed thus: "the plaintiff (the Prime Minister) and his political allies have made use of the machinery of the courts to overwhelm their political opponents with litigation and sought by such means to render their opponents financially bankrupt and thereby remove them from the political scene."<sup>99</sup> In *AG v Lingle*, the AG adduced evidence that between 1971-1993, "there had been 11 cases of oppo-

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95. *In the matter of Articles 5(2), 5(2A) and 22H(1) of the Constitution of the Republic of Singapore*, Const. Reference No. 1 of 1995, [1995] 2 SING. L. R. 201.

96. *Constitutional Tribunal Plea Rejected*, STRAITS TIMES (SING.), Jan. 30, 1999 at 54. Jeyaretnam argued, in relation to charging Chee Soon Juan for not having a licence to give a talk at Raffles Place on December 29, 1998 (not being "entertainment" in the popular sense), that the Act violated article 14 (Free speech), and was thus an "eminently suitable question" for a constitutional reference. Acting on Cabinet advice, the President refused to make this request, as it would constitute "an improper interference" with the on-going judicial process. The exchange of letters between the President's office and Jeyaretnam were made public.

97. This question turned on the wording of article 144(1) of the Singapore Constitution. *Send USSGD 5b Loan Case to Constitutional Court, says Jeya*, STRAITS TIMES (SING.), Nov. 24, 1997 at 28.

98. P. Kumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, U.N. Commission on Human Rights, 52nd Sess., para 218, UN Doc. E/CN.4/1996/37.

99. Goh Chok Tong v Jeyaretnam Joshua Benjamin, [1998] 1 SING. L. R. 547, 562H (H.C.). Here, Judge Rajendran felt impelled to state that Singapore had "an open system of justice" and that there were "no private directives to a judge from the executive or from anyone one else on how a case is to be conducted." *See Id.* 563, para. 31-32.

sition politicians who had been made bankrupt after being sued."<sup>100</sup>

These allegations have been robustly denied in parliamentary debates.<sup>101</sup> Senior Minister Lee noted that "Our judiciary and the Rule of Law are rated by WEF (World Economic Forum), IMD (International Institute for Management Development) and PERC as the best in Asia."<sup>102</sup> Senior government officials such as the Attorney General issued this accolade in 2002:

The efficiency of the Judiciary in clearing court cases continues to command wide admiration. The general public and the legal fraternity are proud of the achievements of the Judiciary . . . their fair and efficient administration of justice. . . has enhanced the Rule of Law and the reputation of our legal system.<sup>103</sup>

Undoubtedly, the Singapore judiciary has undertaken innovative reforms to improve the administration of justice, succeeding in reducing case backlogs through pro-active case management, holding night courts, and using information technology to improve accessibility.<sup>104</sup> These developments have been complemented by an initiative to make Singapore legislation freely available online. By increasing accessibility to legal information, this consolidates those aspects of the Rule of Law requiring that laws be transparent and ascertainable.<sup>105</sup> A recent judgement affirming an expansive reading of standing, where constitutional rights were infringed, also vindicates the Rule of Law by promoting access to justice in allowing concerned parties to legally challenge unlawful action.<sup>106</sup>

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100. *Judges: Enough Evidence for Case Against Lingle, Four Others*, STRAITS TIMES (SING.), Jan. 10, 1995 at 2.

101. P. CUMARASWAMY, *supra* note 97, at para. 214. See 65 SING. PARL. REP. ., Nov. 2, 1995 (Independence and Integrity of Singapore's Judiciary) cols. 223 ff.

102. Lecture of SM Lee Kuan Yew at the JFK School of Government (Harvard University), *For Third World Leaders: Hope or Despair?* Oct. 17, 2000, available at <http://www.gov.sg/sprinter/search.htm>.

103. Speech by the Attorney General, *Opening of Legal Year 2002*, available at [http://www.sal.org.sg/media\\_speeches\\_oly2002AG.htm](http://www.sal.org.sg/media_speeches_oly2002AG.htm).

104. See *Spore Courts Have World Class Statute*, STRAITS TIMES (SING.), Apr. 11, 1999 at 1 (CJ pointing out that the World Bank has recommended the Subordinate Courts as a model).

105. Speech by Ho Peng Kee, Minister of State for Law and Home Affairs, *Launch of Singapore Statutes Online*, Nov. 15, 2001, available at <http://www.statutes.agc.gov.sg>.

106. The Court of Appeal S.L.R. affirmed that any citizen could challenge the alleged violation of a constitutional guarantee. *Chan Hiang Leng, Colin v Minister for Information and the Arts* [1996] 1 SING. L. R. 609, 614C-F.

This is not to say that there have not been concerns about financial accessibility with rising court costs,<sup>107</sup> but the prospect of delayed justice, which is denied justice, has been curtailed.<sup>108</sup>

Various concerns relating to maintaining judicial independence exist. One relates to tenure issues, where judges past the age of 65 tend to be hired as contract judges for a certain number of years. Article 98 explicitly authorises such practice. For example, the Chief Justice, who is 77, is currently on a 3-year contract until 2004.<sup>109</sup> Extensions of judicial terms by contract are not automatic,<sup>110</sup> raising the prospect that contract judges could be “beholden” to the executive, compromising the appearance, if not the reality, of impartiality.<sup>111</sup> The same concern applies to Judicial Commissioners. This scheme, originating in 1986, sought to attract lawyers from the high-income private sector onto the bench through a probationary “trial period” of perhaps 1-2 years, allowing an assessment of their judicial suitability. Judicial Commissioners desirous of a career judgeship may not be able to act “without fear or favour” to avoid alienating those who facilitate elevation to the bench. Alternatively, the scheme provides short-term judges to facilitate the disposal of Supreme Court business for periods as short as 6 months or to hear specific cases only.<sup>112</sup>

Furthermore, the lower judiciary is susceptible to extraneous political pressures as subordinate court judges lack tenure and are actually part of the executive branch of government, an exception to the separation of powers principle. The President appoints subordinate court judges on the Chief Justice’s (also the Chairman of the Legal Services Commission, which determines appointment terms) recommendation. Thus, district court judges are routinely shuffled between the executive and judicial branches, sustaining concerns that they might imbibe the execu-

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107. *Appeal Limit not Meant to Deny Access, Says CJ*, STRAITS TIMES (SING.), Jan. 10, 1999. This refers to an amendment to the Supreme Court of Judicature Act which restricts the automatic right of appeal to, respectively, the High Court (for civil cases involving less than SGD 50,000) and Court of Appeal (for cases less than SGD 250,000). *Has the Price of Justice Gone Up?*, STRAITS TIMES (SING.), Nov. 27, 1998, at 52. See also Francis Seow, *The Judiciary: Courts for the Rich* in THE SINGAPORE PUZZLE, *supra* note 84, at 119-20.

108. Karen Blochinger, *Primus Inter Pares: Is the Singapore Judiciary First Among Equals?* 9 PAC. RIM. L. & POL’Y J. 591 (2000) [affirming judicial reform for efficiency].

109. *CJ Yong appointed for 3 Years*, STRAITS TIMES (SING.), Mar. 16, 2001, at 1.

110. For example, when Justice GP Selvam turned 65, he left the bench. See “Retired Judge Back to Practicing Law,” STRAITS TIMES (SING.), July 13, 2001, at H7.

111. This is particularly since Contract Judges, whose contracts are renewable at the government’s discretion, are paid their fully salary rather than their pension and thus have a financial incentive to toe the political tie. NEW YORK BAR RECORD, *supra* note 2, at 64-65.

112. Art. 94(5).

tive's corporatist ideology,<sup>113</sup> infecting their discharge of judicial functions.

In this respect, there have been complaints of executive interference with the judiciary over the transfer of District Judge Michael Khoo to the Attorney General's Chamber after hearing a criminal case against opposition politician JB Jeyaretnam, where he imposed a fine not entailing the loss of Jeyaretnam's parliamentary seat.<sup>114</sup> The case was tried in January 1981. In August 1981, Khoo was transferred to the Attorney General's Chambers and removed from the bench. This move was characterized by the Attorney General as coincidental and long overdue, but perceived as a politically motivated punitive transfer.<sup>115</sup> A commission led by Judge TS Sinnathuray, whose judgments

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113. This relates to a close and consultative relationship between the executive and judiciary. Kanishka Jaysuriya, *Corporatism and Judicial Independence within Statist Legal Institutions in East Asia* in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 173 (1999).

114. Art. 45(e) of the Singapore Constitution disqualifies a parliamentarian who has been convicted and fined more than SGD 2000, without receiving a free pardon. Khoo fined Jeyaretnam on a count of defrauding but acquitted him of a charge concerning an alleged false statement made in respect of the Workers' Party account. The fine thus imposed was of a size that did not result in the loss of Jeyaretnam's seat. The High Court later overruled Khoo's acquittal and ordered a re-hearing on the false statement charge. A fine was subsequently levied leading to the loss of his parliamentary seat. He was also struck off the rolls on a motion by the Attorney General alleging a crime indicating moral turpitude under the Legal Professions Act. Jeyaretnam appealed his disbarment before the Privy Council and was vindicated and reinstated. The Privy Council expressed its "deep disquiet" that by a "series of misjudgments" the appellant had "suffered a grievous injustice" and was fined, imprisoned and publicly disgraced for offences he was not guilty for. He had been "deprived of his seat in Parliament and disqualified for a year from practicing his profession." While their decision restored Jeyaretnam to the bar, because criminal appeals to the Privy Council had been cut off, they could not right the other wrongs suffered, noting that the "only prospect" for redress was a presidential pardon. See *JB Jeyaretnam v Law Society of Singapore* [1988] 1 SING. L. R.; [1989] 1 M.L.J. 137. The Attorney General subsequently refused to recommend pardon as he considered that no injustice had been done and publicly pronouncing that the Privy Council had made wrongful conclusions! For the entire saga, see *NEW YORK BAR RECORD*, *supra* note 2, at 56-58. See also Francis Seow, *The Judiciary*, in *THE SINGAPORE PUZZLE*, *supra* note 84 106, at 111-14. Shortly after the Privy Council's decision, Parliament decided to amend the Legal Professions Act to abolish appeals arising from disciplinary cases. Opposition politicians in parliamentary debates alleged that this was motivated by "childish pique to serious matters of principle," in retaliation for what the government considered to constitute the Privy Council's interference with local politics: Dr Lee Siew Choh 52 SING. PARL. REP., *Legal Profession (Amendment) Bill*, Feb. 17, 1989, at col. 753. Mr. Chiam See Tong noted that it came "at the most inopportune time because it comes after Jeyaretnam's appeal judgment has been released." *Id.* at col. 764. He wondered whether the hasty amendments would also target prominent opposition member Francis Seow to prevent him for the future practice of law. *Id.* at col. 765. Taken together, a reasonable observer might consider that these measures were designed to harass opposition politicians, or at least inadvertently had such effect.

115. *NEW YORK BAR RECORD*, *supra* note 2, at 65.

tend towards being pro-government, investigated these allegations of executive interference and concluded that they were unfounded.

### III. ECONOMICS AND POLITICO-LEGAL CULTURE

#### A. THE ECONOMIC SYSTEM & THE RULE OF LAW: FROM THIRD WORLD TO FIRST

##### 1. *Law as an Instrument of Economic Development*

Within a generation since gaining Independence on August 9, 1965, the island city-state of Singapore has achieved remarkable economic success, lauded as “a poster boy of how to pursue economic development”<sup>116</sup> and the “Switzerland of the East.”<sup>117</sup>

While Singapore’s *raison d’etre* was trade, it has since relied heavily on a rationally organized economic system, export-oriented industrialization, maintaining a low level of protectionism, and has actively courted large-scale foreign investment and MNCs through clear investment laws, a skilled labor force and securing the protection of property rights. It has also sought to position herself as a major international financial centre.

In what has been described as the most internationalized national economy where foreign trade is thrice the size of the national product, the Government retains a primary role in making economic policy and is a major player in the economy. It maintains direct or indirect interests in certain companies and through its licensing and regulatory powers, can champion certain economic sectors or companies. It also restricts the types and quantity of shares foreign investors can hold (e.g. in the publishing industry).<sup>118</sup> Statutory boards like the Economics Development

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116. This accolade conferred by the Hong Kong based PERC was pointed out by PM Goh at his 2001 National Day Rally: *Don’t Walk Around with Your Head Hanging so Low*, STRAITS TIMES (SING.), , Aug. 20, 2001, at H1. Senior Minister Lee Kuan Yew opined that the reason why Singapore and Hong Kong survived the 1997 Asian financial crisis better than most was because “both Confucianist societies. . . had British systems of law, business methods that were transparent, accounting practices of international standard, open tenders and binding contracts, negotiated on level playing fields and bank loans made at arm’s length.” LEE KUAN YEW, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965-2000 599 (HarperCollins Publishers, 2000).

117. *Geneva Latest European City to Attract S’pore Investors*, STRAITS TIMES (SING.), Oct. 22, 1993, at 44. In 1990, Lee Kuan Yew set the target of achieving the 1984 Swiss Standard of Living by 1999. It’s *Singapore’s Turn to Show the Swiss*, STRAITS TIMES (SING.), Dec.13, 2000, at 5. PM Goh at his 2001 National Day Rally speech announced his quiet satisfaction that Singapore had achieved a Swiss standard of living in 2000. *Don’t Walk Around with your Head Hanging so Low*, STRAITS TIMES (SING.), Aug. 20, 2001, at H1.

118. Newspaper and Printing Presses Act (Cap 206) §9 provides for two classes of shares in newspaper companies: ordinary and management shares. Only Singa-



Board and Trade Development Board help lead Singapore's economic policies. Temasek Holdings, a government investment company (GIC) has considerable assets and controls a third of the Singapore stock market with substantial shareholdings in large Singapore government-linked companies (GLCs) like Singapore International Airlines, SingTel, SMRT and DBS Bank Limited which generate 60% of the GDP. Today, Singapore may be described as having a growth-oriented, heavily interventionist or planned capitalist economy, with a commitment to global free trade.<sup>119</sup>

## 2. *The Rule of Law and A Stable Business Environment: The "Economics First" Argument*

The role of law as a tool to create a stable business environment and to engender socio-economic transformation through authoritarian control is apparent here.<sup>120</sup> Centralised government power was considered vital to effect unpopular or controversial government decisions. For example, the labour unions, which numbered about 136 in 1954, had to be reined in.<sup>121</sup> Today, a close tri-partite relationship exists between the government, management and the labour unions under the umbrella organisation of the National Trade Unions Congress (NTUC) whose Secretary General is a member of the ruling People's Action Party (PAP). The unions have thus been neutered as a source of opposition and potential economic setback through strikes.<sup>122</sup> The presence of a disciplined, skilled and well-educated workforce, fluent in English as the *lingua franca*, itself a function of government policies, attracts foreign investors.<sup>123</sup> The government as-

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pore citizens or government approved corporations may hold the latter which carry 200 votes each.

119. Singapore promotes free trade through its diplomacy, supporting the ASEAN Free Trade Area (AFTA), Asia-Pacific Economic Co-operation (APEC) forum and the World Trade Organisation. It also actively negotiates free trade agreements and has concluded FTAs with New Zealand, Mexico, and Chile.

120. For a critical perspective, see CHRISTOPHER LINGLE, *SINGAPORE'S AUTHORITARIAN CAPITALISM: ASIAN VALUES, FREE MARKET ILLUSIONS & POLITICAL DEPENDENCY* (Locke Institute, 1996). Lingle argues that executive control over the judiciary and legislature in a "soft authoritarian" state means that law follows the regime's whims, despite the scrupulous application of justice to commerce cases, especially when the interests of MNCs are involved, and the absence of systemic human rights violations like political murders. He characterises the resulting system as one of rule by and for rulers in place of the Rule of Law.

121. R.K. VASIL, *GOVERNING SINGAPORE* 146-63 (1992).

122. See generally LEE KUAN YEW, *Winning over the Unions*, *supra* note 116, at 103-15; E.C. Surin, *Government Influence on Labor Unions in a Newly Industrialized Economy: A Look at the Singapore Labor System*, 18 *COMP. LAB. L.J.* 102 (1996).

123. See generally C. TREMEWAN, *THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE* (St. Martin's Press, 1994).

siduously seeks to maintain this state of affairs in sustaining Singapore's economic competitiveness in globalisation's face.<sup>124</sup>

Conversely, the Singapore political regime, which since Independence has been dominated by a single political party, the PAP, has been variously described by both internal and external critics as authoritarian, intolerant of political dissent and repressive in limiting civil-political rights like free speech and press and associational rights. Indeed, the process of becoming "Singaporeanized" is characterized as a state of becoming "politically inert and economically dynamic."<sup>125</sup>

Nevertheless, the political leadership remains unapologetic about its *modus operandi*, taking up cudgels with its critics on the issue of the universality of human rights. Drawing from its empirical economic success, it has argued that interpreting and implementing human rights is contingent upon cultural values ("Asian values" argument)<sup>126</sup> and a country's stage of economic development.<sup>127</sup> Pursuant to the "economics first" argument, the need to run a "tight ship"<sup>128</sup> in maintaining social order and discipline, without attention to civil-political rights, through a managed democracy, is regarded as the key catalyst to achieving economic development.<sup>129</sup> The Asian way is thus presented as that of economic modernisation sans political liberalisation. Lee Kuan Yew has stated that the Rule of Law (as a tool for maintaining social control), not democracy, is more important for sustaining a free market as foreign investments will not be forthcoming without it, pointing to China's successes under a tight socialist order.<sup>130</sup> Lee in another context prescribed the curative powers of Singapore-style discipline as an antidote to the

124. See generally R. Sen & S.S. Pattanayak, *The Challenges Before the Singapore Economy*, 24 FLETCHER F. WORLD AFF. 15 (2000).

125. M.C. Davis writes of the trend towards the "singaporeanization" of Hong Kong in these terms: M.C. Davis, *Constitutionalism under Chinese Rule: Hong Kong after the Handover* 27 DENV. J. INT'L L. 275, 297 (1999).

126. See generally ANTHONY LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY* (Cambridge University Press, 2001)

127. Speech by Wong Kan Seng (Foreign Affairs Minister, Singapore), *The Real World of Human Rights*, Vienna, June 16, 1993, reproduced in S. J. L. S. 605-10 [1993].

128. Foreign ministry official Kishore Mahbubani noted in his interview with the New York Bar mission that "What we consider a tight ship, you consider a closed political system." NEW YORK BAR RECORD, *supra* note 2, at 24.

129. This view is opposed as being both empirically unsustainable and ethically untenable by Amartya Sen who argues for a holistic vision of human welfare and that democracy is both instrumental and constitutive of the development process. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Knopf, 1999).

130. *Rule of Law above Democracy, Says SM*, STRAITS TIMES (SING.), Oct. 29, 1999, at 3.

Philippines' over-enthusiastic democracy and economic woes.<sup>131</sup> However, the firm hand of Ferdinand Marcos failed to deliver his country from economic underdevelopment, rendering suspect the espoused nexus between economic growth and discipline,<sup>132</sup> particularly in the light of the indivisibility of rights.

In Singapore, stability was also achieved through a strong criminal law system and preventive detention laws to thwart security threats, which preserves social order over criminal due process rights. Lee has even attributed Singapore's successes to its populace having the "right values," that is, "Confucianist" values relating to the prioritising of community interests, reverence for scholarship and respect for government leaders that allowed the government to set up a meritocratic civil service, limit trade union powers and implement compulsory military service.<sup>133</sup>

### 3. *The Rule of Law and an Anti-Corruption Environment*

Singapore's success is credited by its leaders to the presence of a wise, rational and non-corrupt government strong enough to rule. To avoid the corruption, cronyism and nepotism bedeviling other Asian governments, a fundamental PAP stricture is to practice meritocracy as a cornerstone of government policy and to deal robustly with imputations of corruption.<sup>134</sup> For example, when it was alleged that Senior Minister (SM) Lee and his son Deputy PM Lee Hsieng Loong had profited from special discounts in relation to some luxury properties, SM Lee called for parliamentary debates to air the issue.<sup>135</sup> PM Goh Chok Tong called for a Corrupt Practices Investigation Bureau (CPIB) investigation, which found no impropriety, with Parliament, including opposition MPs, affirming this conclusion.<sup>136</sup> SM Lee praised

131. Democracy: Asia's Major Export from the West, *Guardian Weekly*, July 25, 1993.

132. See generally Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 *TOURO INT'L L. REV.* 1 (2001).

133. *Confucian Values Helped S'pore Prosper: SM Lee*, STRAITS TIMES (SING.), Oct. 6, 1994, at 1. He noted that Malay and Indian cultures also shared some of these values integral to the nation-building process.

134. Notably, the issue of nepotism was left unsaid when the wife of Deputy Prime Minister Lee Hsien Loong, Madam Ho Ching, was appointed as the executive director of Temasek Holdings. *Nepotism Not the Real Issue, It's Performance*, STRAITS TIMES (SING.), June 12, 2002. Simply stated, the real issue was that of ability and merit.

135. *Purchase of Properties by Senior Minister and Deputy Prime Minister BG Lee Hsien Loong*, 66 SING. PARL. REP., cols. 184-240, 323-52, 257-323, May 21-22, 1996.

136. Subsequently, new rules on the purchase of properties by government leaders were issued by the Prime Minister to safeguard government integrity. *SM Lee Defends Clean Image of S'pore*, STRAITS TIMES (SING.), May 30, 1996, at 52; *Debate Showed that No One is Above the Law*, STRAITS TIMES (SING.), May 24, 1996, at 52.

the “impersonal and effective” system he established which could report on his own conduct, showing that “no one is above the law,”<sup>137</sup> presenting further evidence that “the Government upholds the Rule of Law.”<sup>138</sup> This incident also illustrates the importance the PAP places on moral legitimacy, which could be eroded through the perception that ministers enjoyed unfair privileges.

A further move to prevent corruption (and attract private sector persons) has been the criticised policy of high ministerial salaries, which brushes aside “naïve” calls to public service in favour of hard-headed economic rationality. Since 1994, ministerial pay has been pegged to top private sector salaries. Despite widespread disquiet and a call to put this issue to a referendum, which was rejected as “childish talk” entertained by weak governments,<sup>139</sup> this policy was implemented and parliamentary debate was conducted over a white paper on competitive salaries.<sup>140</sup> PM Goh, at his 2000 National Day Rally speech, noted that paying good people to encourage them to accept government posts was an ancient Confucian precept, necessary to sustain the virtuous cycle of good government and strong economic growth.<sup>141</sup> Furthermore, many Western governments envied this gutsy move while not daring to adopt it. The impugned conventional wisdom that public servants should receive only a modest wage would impede “a self-sustaining system which will produce good men and women to run the country.”<sup>142</sup> It appears that an incorruptible public service cannot be produced purely through a moral incentive, but requires a financial incentive, as well.

#### 4. *Performance Legitimacy and Assessment*

Undoubtedly, the PAP government has successfully provided for Singaporeans’ “basic needs.” Home ownership has been promoted under the Housing and Development Board’s

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137. LEE KUAN YEW, *supra* note 116, at 197-98.

138. Ho Peng Kee (Minister of State for Law), 71 SING. PARL.REP., NOV. 24, 1999, col. 592.

139. *Let the People Decide Through a Referendum*, STRAITS TIMES (SING.), NOV. 1, 1994, at 18; *Referendum Used “Only by Weak Leaders,”* STRAITS TIMES (SING.), NOV. 12, 1994, at 32.

140. *Competitive Salaries for Competent and Honest Government*, 62 SING. PARL. REP. ., NOV. 1, 1994, cols. 752-88.

141. *I Would Have Failed S’pore if . . .*, STRAITS Times (Sing.), Aug. 21, 2000, at 35. PM Goh quoted Chinese philosopher Sun Zi: “It is impossible to have good people to come forward to serve without proper rewards; it is impossible to deter bad people from committing crimes without proper punishment.” *Id.*

142. *Id.*

public housing scheme,<sup>143</sup> there are excellent transportation facilities, reasonable health care services, and a much admired, albeit criticised, system of public education. Living standards have been raised to near First World levels.<sup>144</sup> The public is required to participate in savings schemes like Medisave,<sup>145</sup> Edusave, and the Central Provident Fund (CPF), a mandatory individual retirement scheme.<sup>146</sup> Singapore has considerable reserves and low external debt. Its three universities are exhorted to become the Boston of the East in obeisance to Harvard and MIT.<sup>147</sup> The European model of welfarism that promotes a dependency ethos has been definitively rejected.<sup>148</sup> In short, the level of socio-economic rights in Singapore ranks highly among Southeast Asian states. SM Lee considers that “the CPF and home ownership have ensured political stability,” ensuring the PAP’s successive re-election “with solid majorities.”<sup>149</sup>

This economic success grounds the government’s performance-based legitimacy, there being a reciprocal relationship that “as long as the leaders take care of their people, they will obey

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143. The Housing and Development Board was the first statutory board the PAP created upon entering into power, charged with building low-cost housing. Today, about 90% of Singaporeans own their homes through this low-cost housing scheme, which aims to give citizens a stake-holder interest and a sense of solidarity with the Singapore polity, thereby enhancing the PAP’s legitimacy and popularity. See Kevin Y.L. Tan, *Economic Development, Legal Reform and Rights in Singapore and Taiwan*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 268-70 (J.R. Bauer & D.A. Bell eds., 1999).

144. While the GDP was about SGD 3 billion at 1965, it was estimated to be around SGD 98.5 billion in 2000. The per capita GDP was around SGD 31,139. It was estimated by a Department of Statistics report that about 4% households remained on or near the poverty line. *Need for a Re-think on How Govt Helps Poor*, STRAITS TIMES (SING.), May 31, 2000, at 47.

145. This was implemented in 1984 and could be used to reinforce family ties and to pay for the health costs of immediate family members. Later schemes providing for insurance against catastrophic illnesses (Medishield) and to cover those who had otherwise exhausted their funds (Medifund) were established. LEE KUAN YEW, *supra* note 116, at 123-24.

146. See *id.* at 126-28.

147. DPM Tony Tan was tasked in 1997 with PM Goh’s vision to turn Singapore into the “Boston of the East.” This has led to a spate of “Americanization” initiatives in Singapore’s universities, from changes in entrance examinations, promotion schemes to nomenclature, forsaking the British universities model. *American Model for S’pore Universities*, STRAITS TIMES (SING.), Mar. 27, 2001, at H4. See also *Varsity Changes Controversy: Does Yankee do that Dandy?*, STRAITS TIMES (SING.), June 8, 2002.

148. Rather than redistributing wealth through subsidies, the PAP preferred to do so by asset enhancement. It sought to avoid the debilitating state of reliance on welfare benefits wrought and “to reinforce the Confucian tradition that a man is responsible for his family.” LEE KUAN YEW, *supra* note 114, at 126.

149. *Id.* at 127-28.

their leaders.”<sup>150</sup> Singapore validates its policies by “the more rigorous test of practical success,” ignoring its critics and abstract theories.<sup>151</sup>

Law is clearly conceived of as a tool for economic development. As Chief Justice Yong noted:

Singapore is a nation which is based wholly on the Rule of Law. It is clear and practical laws and the effective observance and enforcement of these laws which provide the foundation for our economic and social development. It is the certainty which an environment based on the Rule of Law guarantees which gives our people, as well as many MNCs and other foreign investors, the confidence to invest in our physical, industrial as well as social infrastructure.<sup>152</sup>

There is some ambivalence in Singapore’s stance towards the role of law and the legal system, evident in the dichotomized approach evident in regulating commercial and non-commercial spheres of activity. A “universalist” or harmonization approach towards commercial laws is adopted,<sup>153</sup> contrasted with the “relativist” posture in applying culture-based communitarian values in ordering individual freedoms and civil society.

Nevertheless, the dominant view of the Rule of Law in Singapore as an instrumental tool of economic growth, shorn of any intrinsic conception of the Rule of Law as justice, seems attractive to other developing Asian countries like Vietnam. Vietnam reportedly not only admires Singapore as a model for economic success, but also in matters of political management, and has apparently considered the “Singapore style system of controlled independent voices” as a viable model to allow independent candidates to stand for Parliament in a single party Communist system.<sup>154</sup>

150. *Confucian Values Helped S'pore Prosper: SM Lee*, STRAITS TIMES (SING.), Oct. 6, 1994, at 1. Lee noted that Malay and Indian cultures also shared some of these values integral to the nation-building process. *Id.*

151. WONG KAN SENG, *supra* note 127, at 609. “Our citizens live with freedom and dignity in an environment that is safe, healthy, clean and incorrupt. They have easy access to culture, recreational and social amenities, good standards of education for our children and prospect of a better life for future generations.”

152. Speech by Chief Justice P.H. Yong. At the Legal Service Dinner, Apr. 6, 2001, <http://www.supcourt.gov.sg/speeches/speechesindex.htm>.

153. The close similarity between English and Singapore common law in relation to Contract Law is reflected in ANDEW PHANG, CHESHIRE FIRMSTON AND FIFOOT’S LAW OF CONTRACT (1998). Phang notes: “The foundation of Singapore contract law is to be found in the principles of the English common law and equity, as supplemented by some local legislation as well as English contract statutes received via the Application of English Law Act 1993.” *Id.* at 4.

154. *Vietnam to Relax its Electoral Rules*, STRAITS TIMES (SING.), Nov. 22, 2001, at A4.

## B. POLITICO-LEGAL CULTURE, LEGITIMACY AND THE RULE OF LAW

### 1. *Singapore Legal Culture: The Conflation of State, Government and Society?*

Singapore's legal culture is framed within the context of a hegemonic *de facto* one party state where political power is concentrated in the PAP governing elite.<sup>155</sup> They have remained in power since 1959, winning a resounding 75.3% of the vote at the August 2001 General Elections.<sup>156</sup> Notably, only 33% of the eligible voters were able to vote since most of the electoral wards went uncontested, a common feature in Singapore General Elections, as the incumbent government is usually returned to power on Nomination Day.<sup>157</sup> The phenomenon of considering elections "non-events" belies a de-politicising effect.<sup>158</sup>

The government tends to conflate the PAP as the ruling political party with the state of Singapore, a concept anathema to liberal constitutions.<sup>159</sup> This was evident during the campaigning process for the 1997 General Elections where electioneering strategies involved the politicisation of the public housing programme. The PAP promised (and implicitly "threatened") voters in marginal wards that voting for the PAP candidate would mean the allocation of state resources for ward upgrading programmes, an exercise in asset enhancement underwritten by public funds.<sup>160</sup> During the 2001 election campaign, PM Goh specifically told Potong Pasir residents (an opposition stronghold) that precincts evidencing at least 50% PAP support (which means

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155. Political pluralism formally exists in Singapore, with some 20 political parties registered under the Societies Act (ch. 311). The PAP maintained a monopoly on Parliament between 1968 and 1980, until JB Jeyaretnam won the Anson by-election in 1981. Since then, Opposition politicians, primarily from the Worker's Party, Singapore Democratic Party, and Singapore Democratic Alliance, have only been able to win one to four parliamentary seats.

156. 75.3% — *Resounding win for PAP*, STRAITS TIMES (Sing.), Nov. 4, 2001, at 1. Voting percentages only relate to those whose electoral wards are contested.

157. Only 29 of the 84 seats in Parliament were contested during the 2001 General Elections. Information on Singapore elections is available at <http://www.ecitizen.gov.sg/>.

158. See *Walkover, When Polling Day is a Non-event*, STRAITS TIMES (SING.), Apr. 14, 2001, at H8. See also *Elections that Leave Voters Cold*, STRAITS TIMES (SING.), Apr. 14, 2001, at H8. Notably, the last Presidential elections were not contested and hence, SR Nathan was declared elected President on August 18, 1999 in accordance with §15, Presidential Elections Act (Cap 240A).

159. Stephanie Lawson describes the PAP's pervasive control over Singapore society as the "paradigmatic case of fusion between state, regime, government and party." See Stephanie Lawson, *Confucius in Singapore: Culture, Politics and the PAP State*, in WEAK AND STRONG STATES IN ASIA-PACIFIC SOCIETIES 125 (P. Dauvergne ed., 1998).

160. See James Chin, *Anti-Christian Chinese Chauvinists and HDB Upgrades: The 1997 Singapore General Election*, 5 S.E. ASIA RES. NO. 3, 217-41 (1997).

that numbered voting slips can be traced to specific precincts, undermining the secrecy of the vote) would enjoy priority in upgrading programmes.<sup>161</sup> This has caused an opposition politician to wonder “whether a person, who becomes the Prime Minister of a country should behave as though he is the Secretary General of the ruling party. Is he looking after the interests of the party or looking after the interests of the nation?” The unabashed standard government reply has been that since the government had accumulated Singapore’s reserves, the electorate could either vote PAP and get PAP programmes, or not.<sup>162</sup>

In terms of political strategy, the PAP seeks to convey the impression that it represents all viewpoints (or creates constitutional institutions like the NCMP and NMP scheme to allow the articulation of alternative viewpoints) by co-opting critics<sup>163</sup> and managing other possible sources of dissent like trade unions. Like a colossus, the PAP bestrides Singapore’s broad political middle ground, saturating the grassroots with pro-establishment committees (e.g., Residents and Citizens Consultative Committees).<sup>164</sup>

The government, cognisant of the media’s power to erode institutional authority, rejects a “fourth estate” adversarial watchdog conception of the press. It advocates a “responsible journalism” approach where the press works as a national partner tasked with accurately reporting and facilitating the building of national consensus, without being a sycophantic lapdog deleterious to an increasingly knowledge-based society.<sup>165</sup> A strict sanctions regime also controls the foreign press through restrict-

161. *SDA Distances Itself from Chee’s Behaviour*, STRAITS TIMES (SING.), NOV. 1, 2001, at H4.

162. Low Thia Kiang (Workers Party), 71 SING. PARL. REP. ., 24 Nov. 24, 1999, at col. 622.

163. For example, at the 2001 General Elections, the PAP fielded Vivian Balakrishnan, a 1980s student leader who is known for his critical views on government policies, and promptly appointed him Minister of State. The NMP scheme has also been described as a way of co-opting critical but friendly opponents of the student. *After Nov 3, What Next for Singapore Politics?*, STRAITS TIMES (SING.), NOV. 10, 2001, at H12.

164. H.C. CHAN, *THE POLITICS OF ONE PARTY DOMINANCE: PAP AT GRASSROOTS* (1976).

165. See L.A. Thio, *Human Rights and the Media in Singapore*, in *HUMAN RIGHTS AND THE MEDIA* 72-75 (R. Haas ed., 1996); see also *Sense of Responsibility Must Follow Power of Press*, STRAITS TIMES (SING.), Aug. 12, 1993, at 26; *Be Fair, Be Truthful, Be Part of a Virtuous Cycle*, STRAITS TIMES (SING.), July 16, 1995, SR4; *Media Should Not Set National Agenda*, STRAITS TIMES (SING.), Nov. 4, 1999, at 4; *No Lackey or Adversary, the Media’s a Partner*, STRAITS TIMES (SING.), Nov. 27, 1999, at 86.



ing the circulation of publications deemed to interfere in domestic politics.<sup>166</sup>

## 2. *Bases of Legitimacy: Moral and Political: The Junzi takes the Stand*

Despite the PAP's heavy reliance on performance-based economic legitimacy, it seeks the electoral validation which confers political or democratic legitimacy and which is equated with a general approval for the PAP style of governance, warts and all. For example, in replying to criticisms about the draconian Internal Security Act, Law Minister Jayakumar rhetorically posed: "If we abuse the ISA, do you think a sophisticated electorate would tolerate it?"<sup>167</sup> Repeated electoral success is taken as a validation of government practices and policies, as proof positive of the Rule of Law's health. The implicit reasoning is that elections serve as a political check capable of ousting a repressive regime. Political turnover, however, is something Independent Singapore has never experienced and is unlikely to, for the foreseeable future.<sup>168</sup>

Moral legitimacy is also claimed in speaking of a government of virtuous men or latter-day incarnations of the Confucian *junzi*, who is a superior man with the moral duty to lead. A 1991 White Paper on what the PAP government considers Singapore's shared values states:

The concept of government by honourable men 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 ideas that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.<sup>169</sup>

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166. See Newspaper and Printing Presses Act, c. 206, §16 (Sing.). On the control of the media in Singapore, see generally FRANCIS SEOW, *THE MEDIA ENTHRALLED: SINGAPORE REVISITED* (1998).

167. NEW YORK BAR RECORD, *supra* note 2, at 27.

168. Ho Peng Kee, 71 SING. PARL. REP., Nov. 24, 1999 at col. 592 (stating that NCMP Jeyaretnam was insulting Singaporeans "by alleging that the Rule of Law does not prevail in Singapore because this Government which stands on the Rule of Law has been repeatedly re-elected in 10 general elections since 1959.") This, however, is a non sequitur.

169. SHARED VALUES WHITE PAPER, 1991, cmd. 1, para. 41(Sing.). This paper is without legal effect but may be taken as the government's preferred ideology. For a critical reading, see N. Balakrishnan, *Values Offer Shares in Confucian Society: Esprit de Core*, 151 (6) FAR E. ECON. REV., Feb. 7, 1991, at 27. In 1988, Goh Chok Tong said in Parliament: "Singaporeans expect the Prime Minister, and indeed any minister, any MP, to be a superior man, a man of ability and integrity who can set things right and ensure good government. He must be a junzi, a Confucian gentleman." *What Qualities Would You Want in Political Leaders?*, STRAITS TIMES (SING.), Nov. 28, 1992, at 33.

This reads like an apology for power, and would seem to beckon the discovery of the Madisonian Angel who may be trusted with maximal powers because of his wisdom and benevolence.<sup>170</sup>

Thus demonstrated virtue may be as, if not more, important than the Rule of Law. Where impugned, PAP leaders choose the courts as the forum of vindication. When suing JB Jeyaretnam for libel, PM Goh noted in court that government leaders must be *junzi* and “if our integrity is attacked, we defend it.”<sup>171</sup> A corollary PAP tactic is to demonise or impugn as dishonourable certain opposition politicians<sup>172</sup> while affirming others!<sup>173</sup>

### 3. *The Construction of a National Ideology and the Valorisation of Pragmatic Confucianism*

The Singapore government has been at the forefront of the Asian values debate, a form of culturally relativist arguments in international human rights discourse. Domestically, the government sought to forge a national identity through articulating the shared values of the various communities. Consequently, the Shared Values White Paper (SVWP) was authored, declaring five values: (i) nation before community and society above self; (ii) family as the basic unit of society; (iii) regard and community support for the individual; (iv) consensus instead of contention and (v) racial and religious harmony.<sup>174</sup> True to secularism, the

170. James Madison in the Federalist Papers wrote, “[W]hat 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.” THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cook ed., 1961). Lee Kuan Yew seems to agree with this view of human nature, observing that “human beings, regrettable though it may be, are inherently vicious and have to be restrained from their viciousness.” LEE KUAN YEW: THE MAN AND HIS IDEAS 194 (Han Fook Kwang ed., 1997).

171. *Many People Around the World Embrace Junzi Principle*, STRAITS TIMES (SING.), Aug. 22, 1997, at 36-37.

172. PM Goh has called Chee Soon Juan a “cheat and a liar, a slippery character.” *Found: Team of Good People to Join Politics*, STRAITS TIMES (SING.), Nov. 14, 1995, at 1. Francis Seow has been damned as an intelligent but “a wayward man” who is “prepared to go to bed with foreigners”: Dr. Wang Kai Yen said that if Seow was elected into Parliament, “other scallywags and charlatans follow him,” undermining Parliament’s integrity and entailing a loss of “moral respect” for governors. *Action Under Internal Security Act*, SING. PARL. REP., May 31, 1998. Lee Kuan Yew labeled Tang Liang Hong an “anti-English and anti-Christian” Chinese chauvinist at a rally on December 26, 1999: see *Goh Chok Tong v. JB Jeyaretnam*, [1998] 1 SING. L. R. 547, 557, para. 7. He also dubbed Jeyaretnam a “mangy dog,” “skunk” and “political riff raff.” SING. PARL. DEB., Mar. 19, 1986, cols. 688-89, 720.

173. SM Lee has praised Low Thia Khiang as a “good MP” who “looks after his constituency”: *To Get a Good Government, You Need Good Men in Charge* STRAITS TIMES (SING.), Nov. 2, 1994, at 17.

174. SHARED VALUES WHITE PAPER, 1991, Cmd. 1, para. 52 (Sing.) at 10. See generally IN SEARCH OF SINGAPORE’S NATIONAL VALUES (Jon Quah ed., 1990).

suggestion to include “belief in God” was rejected. It excluded a discussion of political values relating to voter-government relations, preferring to focus on a “depoliticised” version of individual-society relations.<sup>175</sup>

This project was reactionary in seeking to stem the onslaught of adverse Western influences and degenerative values, including the creeping individualism infecting Singaporeans.<sup>176</sup> Hence, the SVWP was aspirational rather than descriptive, with traditional Confucian values like filial piety subject to legal enforcement under the Maintenance of Parents Act (Cap 167B).<sup>177</sup>

Interestingly, though it is currently commonplace for Singapore’s political leaders to insist that Singapore is a Confucian society, Confucian scholars had to be imported to draft a Confucian syllabus for schools in the 1980s, indicating a lack of local scholarly resources and interest. Kuo notes the Confucian movement was a “top-down” initiative, a social engineering exercise in nation-building, where Confucianism comported with Singapore’s dominant political culture, “specifically in terms of paternalism, communitarianism, pragmatism and secularism.”<sup>178</sup>

This attempt to articulate a version of Singapore culture may be criticised as artificial in its selective adoption of a cultural tradition’s traits in order to construct a Neo-Confucianist variant.<sup>179</sup> For example, while drawing heavily from Confucianist tradition with a cursory nod to Malay and Indian traditions, Confucianist traits recognising the validity of criticism against unjust govern-

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175. SHARED VALUES WHITE PAPER, para. 47-51.

176. Goh Keng Swee in 1972 saw Singaporean as “a highly competitive and individualistic person,” a trait sustained by meritocratic polices. GOH KENG SWEE, *THE ECONOMICS OF MODERNIZATION AND OTHER ESSAYS*, 281-83 (1972). Almost 30 years later, Institute of Policy Studies Director Tommy Koh in referring to a 2001 study on national identity noted “I am ashamed that Singaporeans are among the most materialistic people in the world and we are obsessed with making money.” *S’poreans First but Ethnic Ties Still Strong*, STRAITS TIMES (SING.), June 12, 2002, at H3. The point has been made that industrialisation rather than human rights and democracy precipitates excessive individualism.

177. Art Lee, *Singapore’s Maintenance of Parents Act: A Lesson to be Learned from the United States*, 17 LOY.L.A.ENT.L.REV. 671 (1995); *Parent’s Tribunal an Important but Sad Milestone*, STRAITS TIMES (SING.), May 30, 1996, at 54.

178. E.C.Y. Kuo, *Confucianism as Political Discourse in Singapore: the Case of an Incomplete Revitalization Movement*, in *CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY: MORAL EDUCATION AND ECONOMIC CULTURE IN JAPAN AND THE FOUR MINI-DRAGONS* 304, 307 (W.M. Tu ed., 1996).

179. The gender inequality advocated by traditional Confucian family relationships were recognised as unsuitable, and is one of the aspects of Confucianism that had to be updated. SHARED VALUES WHITE PAPER paras. 42 & 44.

ments went ignored.<sup>180</sup> The self-serving focus was on traits emphasising obedience to authority.<sup>181</sup>

Thus, these values espouse a community-oriented, rather than individualist, ethos, stressing individual duties over rights, and preferring hierarchical forms of social organisation. In international discourse, these are presented as a desirable alternative to Western liberal democracy, which has bred excessive individualism and self-centredness.<sup>182</sup> Indeed, this exercise departed from Singapore's prior non-ideological, pragmatic government philosophy. After the failure of the religious education programme in schools,<sup>183</sup> the SVWP represented a continued attempt to inculcate moral values in the populace, in the belief that morality is closely aligned to economic progress.<sup>184</sup>

These "shared values" represent a culture-based justification utilised to legitimise the nature of state-society relations and forms of socio-political control, including attitudes toward law and authority. Since it represents an attempt to construct a "culture" of contemporary relevance, one might expect some inconsistency and ambivalence in its invocation. Paragraph 29 of the SVWP notes that not all Western values are bad and good values from European or American civilisations "such as parliamentary democracy and the Rule of Law" have been "rightly adopted and made our own." The white paper's posture in warning the middle class of dangerous foreign influences and change, addresses citizens as beneficiaries of the state's care rather than its adversaries. As such, "the Rule of Law means nothing more than preparing citizens for the requirements of a national plan

180. LAWSON, *supra* note 156, at 123.

181. Joshua Jeyaretnam, *Human Rights in Singapore: the Social, Ideological and Judicial Mechanisms of Control*, in *THE RULE OF LAW AND HUMAN RIGHTS IN MALAYSIA AND SINGAPORE* 38 (Kehma-s, 1989).

182. President's Speech to Parliament, January 1989, *quoted in the SHARED VALUES WHITE PAPER*, at 1.

183. The programme failed because it caused tensions through inspiring evangelical fervour and was phased out as a compulsory aspect of the school curriculum by 1989. The inclusion of Confucian studies, a suggestion of Lee Kuan Yew, was also criticised as being contrary to Singapore's multi-racial polity. *See generally* JOSEPH TAMNEY, *THE STRUGGLE OVER SINGAPORE'S SOUL: WESTERN MODERNIZATION AND ASIAN CULTURE* (1996).

184. In 1972, Goh Keng Swee said at a Methodists meeting that he would recommend as an economic solution to a poor country the conversion of the population "to some demanding, narrow-minded, intolerant form of the Protestant religion." This would terminate heavy spending and promote honest public administration and would result in "spectacular economic growth." GOH KENG SWEE, *THE PRACTICE OF ECONOMIC GROWTH* 104 (1977). As Kwok Kian-Woon notes, the influence of Max Weber is apparent. Kwok Kian-Woon, *The Social Architect: Goh Keng Swee, in LEE'S LIEUTENANTS: SINGAPORE'S OLD GUARD* 63 (P.E. Lam & Kevin Y.L. Tan eds., 1999).

formulated by a wise and virtuous bureaucratic elite,” rather than an individual rights protection mechanism.<sup>185</sup>

#### 4. *Father Knows Best: Patriarchy as Governance?*

Singaporeans are also accustomed to government attempts to influence behaviour in the most intimate affairs, from admonitions to have more children,<sup>186</sup> to public campaigns to flush toilets, to speak Mandarin rather than dialects, to speak good English, and to smile and be courteous (particularly as this will stimulate the tourist trade). Thus, there appear no limits to the state’s long regulatory arm,<sup>187</sup> Orwellian allusions notwithstanding.

This personality-oriented mode of governance, reminiscent of European feudalism, seems consonant with the government-supported idea of hierarchical relationships, a modified version of Confucian relational hierarchies (*wulun*). The Father is replaced by the State as the *paterfamilias* while the Child is the citizenry. The Goh government has sought to practise a more open, consultative form of government and, without irony, has differentiated his mode of governance from his predecessor’s: “Mr Lee Kuan Yew was like a stern father<sup>188</sup>. . . but I try to do it like an elder brother.”<sup>189</sup>

This paternalistic hierarchy has filtered into the conduct of political debate in Singapore, framed as an exchange between unequal senior and junior parties. Minister George Yeo stated that “[y]ou must make distinctions – what is high, what is low, what is above, what is below . . . within this, we can have a de-

185. Kenneth Christie & Denny Roy, *THE POLITICS OF HUMAN RIGHTS IN EAST ASIA* (2001) at 57.

186. The current campaign to have “three or more if you can afford it” represents a volte-face from the 1970s “Boy or Girl, Two is Enough” campaign. The current debate is over government “baby bonuses,” to encourage couples to have more children to arrest Singapore’s declining birth rate: Susan Long, “The Great Baby debate. *Too Loud, Too Little Too Late*, STRAITS TIMES (SING.), Sep. 23, 2000, at 82-83.

187. See Lewis Malakoff, *Are You My Mommy or My Big Brother? Comparing Internet Censorship in Singapore and the United States*, 8 PAC. RIM L. & POL’Y J. 423 (1999); Joseph Rodriguez, *A Comparative Study of Internet Content Regulation in the United States and Singapore*, 1 ASIAN-PAC.L.&POL’Y J. 9 (2000).

188. Uri Gordon, *Machiavelli’s Tiger: Lee Kuan Yew and Singapore’s Authoritarian Regime*, Oct. 6, 1997, <http://www.singapore-window.org/sw00/000614ug.htm> (quoting Lee as saying, “Between being loved and being feared, I have always believed Machiavelli was right. If nobody is afraid of me, I am meaningless.”).

189. *Spore ‘strict, not Authoritarian*, STRAITS TIMES (SING.), Oct. 9, 1996, at 32. Goh made his “Big Brother” analogy in an interview with *Le Monde* newspaper. *PM to Forge Europe-E. Asia Link Deeper Insight into What Makes Switzerland Tick*, STRAITS TIMES (SING.), Oct. 20, 1994, at 1.

bate. . ."<sup>190</sup> Unsurprisingly, government sensitivity to even "mild criticism" has been likened to that of a "scalded polecat."<sup>191</sup> This attitude will require modification if the government genuinely wishes to promote civic participation.<sup>192</sup>

### 5. *Harmony: Hostility to Adversarialism*

The Confucian valuation of harmonious social relations over dissent is encapsulated in "consensus over contention."<sup>193</sup> This is reflected in the PAP's characterisation of adversarial politics as dangerous: "A two party system would not feed, clothe, house and educate people [and] would put us on the dangerous road to contention, when we should play as one team."<sup>194</sup> Similarly, "an opposition party consisting of bums, opportunists and morons can endanger democracy and bring about chaos, disorder and violence. Equally, a one-party parliament can safeguard democracy and bring about peace, progress and prosperity."<sup>195</sup> And, "the system we want is actually one-party and many small parties to keep us on our toes."<sup>196</sup>

Given the alien quality of the idea of a loyal opposition, competitive politics is cast as portending political instability, quenching investor confidence to Singapore Inc.'s detriment.

Furthermore, the government has lambasted groups including professional societies like the Law Society for venturing into what it considers political criticism,<sup>197</sup> stipulating that only mem-

190. *Debate Yes, But Do Not Take on Those in Authority as Equals*, STRAITS TIMES (SING.), Feb. 20, 1995.

191. CV Devan Nair (former President), STRAITS TIMES (SING.), June 26, 1987.

192. K. Tan, V. Winslow & P.E. Lam, *Show of Good Faith Needed for Civil Society*, STRAITS TIMES (SING.), Jan. 28, 2000, at 80. The government has expressed its intention to increase political space in "gradual increments." *Govt to Open Up Political Space Gradually*, STRAITS TIMES (SING.), Feb. 9, 2002, at 4.

193. SM Lee has noted that "We had open debates, it ended up in riots." *No Single Asian Value System: SM*, STRAITS TIMES (SING.), Sep. 28, 1998, at 2.

194. Commodore Teo Chee Hean (now Rear Admiral), *Plain-Speaking PAP Takes Issues to the People*, STRAITS TIMES (SING.), Dec. 12, 1992, at 26.

195. S. Rajaretnam, quoted in CHAN, *supra* note 161, at 228.

196. PM Goh Chok Tong, *PAP Loss Would Be "Hard to Contemplate Given the Grave Consequences"*, STRAITS TIMES (SING.), Dec. 10, 1992, at 22.

197. The Law Society under the Presidency of current fugitive Francis Seow had commented on proposed legislation (Newspaper and Printing Presses Bill) and was thereafter criticised as becoming politicised. LEE KUAN YEW, *supra* note 114, at 149. The 1991 New York Bar mission alleged "a systematic attack on three essential pillars of lawful rule: lawyers, judges and the law itself. NEW YORK BAR RECORD, *supra* note 2, at 17. This is evident, for example, in the reluctance of lawyers to act for opposition candidates like Tang Liang Hong or in non-commercial suits against the government. J.B. Jeyaretnam, *Removal of Fear in People's Lives* 69 SING. PARL. REP. . Jul, 31, 1998 cols. 675 - 77. It was thought that the establishment of the Academy of Law by the government was meant to displace the influence of the Law Society. The Academy is dominated by government officials and judges and has set up committees to comment on legislation. NEW YORK BAR RECORD 46-61; *Law*

bers of political organisations could participate in politics.<sup>198</sup> Aside from this narrow definition of political speech, this limited range of participants is enjoined not to transcend the “OB markers” (out of bounds markers), presumably in terms of subject-matter.<sup>199</sup> These government-determined, notoriously ambiguous OB markers “chill” potential speech, dampening the development of a democratic ethos and civil society, in a context where entering into opposition politics is considered a high risk venture.<sup>200</sup>

## 6. *Consciousness of Rights and Law?*

A legal culture seeks to explain when people mobilise and invoke or ignore law and legal institutions in any given legal system. It is said that Singapore’s dominant Chinese population tends to avoid formal litigation, preferring other forms of dispute resolution. This is because adversarial lawsuits disrupt the harmonious ordering of human affairs. Further, similar to other East Asian cultures (Korea, Japan and China), they prefer a “strong, decisive and authoritarian form of government,”<sup>201</sup> which shapes attitudes towards law and authority. In contrast with the Western liberal obsession with protecting individuals against state excesses through a strong rights culture, the Chinese

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*Academy: Will It Hurt Legal Fraternity*, STRAITS TIMES (SING.), Feb. 4, 1996, at SR4. See also M. Ewing-Chow & A. Abdullah, *The Structure of the Legal Profession, in THE SINGAPORE LEGAL SYSTEM*, (Kevin Y.L. Tan, ed., 1999) at 368-90.

198. *Join a Party if You Want to Contribute*, STRAITS TIMES (Sing.), Sep. 9, 1993, at 33. Catherine Lim, who wrote an article on government style, was asked by the government to join a political party if she wanted to take part in political debate. *Remaking Public Debate*, STRAITS TIMES (Sing.), Mar. 9, 2002.

199. *Only Those Elected Can Set OB Markers: Senior Minister Lee Kuan Yew’s Interview with the New Paper*, STRAITS TIMES (SING.), Feb. 3, 1995, at 22. He cautioned against moving the OB markers such that the stability of the political system will be imperilled. *SM: Danger in Challenging System*, STRAITS TIMES (SING.), Sep. 19, 1999, at 2. PM Goh has sought to widen the space for political and artistic expression, coining the idea of OB markers to mark the limits of openness. See also *Move Beyond OB Markers to Tackle Challenges*, STRAITS TIMES (SING.), Aug. 16, 1997, at 34 (where the function of OB markers was described as protecting societal fundamental values and ensuring societal leaders are accorded proper deference). Notably, the Singapore 21 Committee in calling for more precise delimitations of the OB markers considered that the low level of civic participation stemmed from a sense that citizens felt no ownership over political affairs or respect for their views, not trusting that engagement in frank discussion of public affairs would not elicit unpleasant consequences. “Active Citizens: Making a Difference to Society” in *Singapore 21: Together We Make the Difference*, [http://www.singapore21.org.sg/menu\\_s21report.html](http://www.singapore21.org.sg/menu_s21report.html).

200. CHRISTIE & ROY, *supra* note 182, at 72.

201. R.H. Hickling, *The Influence of the Chinese Upon Legislative History in Malaysia and Singapore*, 20 MALAYA L.REV. 265 (1978).

are apparently more obligations- than rights-oriented.<sup>202</sup> Authorities are not viewed as adversarial but rather as an extension of familial rule.<sup>203</sup> Indeed, the promotion of informal dispute settlement forms in Singapore has been explained as stemming from a cultural preference for militating against litigiousness.<sup>204</sup> However, this push towards extra-adversarial modes of resolving conflict is not universal as government leaders prefer a judicial solution through libel suits when they feel their reputations impugned. Political reputations appear unsusceptible to negotiation. In addition, when processes such as electoral ones are criticised as unfair, the government has recommended formal judicial solutions to resolve the matter, which is an application of the Rule of Law.<sup>205</sup>

Perhaps owing to culture or unfamiliarity with legal processes, Singapore has in the public law field an underdeveloped sense of rights or "law" consciousness, which has manifested itself differently at various levels.

Firstly, the ramifications of having a written constitution which frames parliamentary government (which developed in the face of parliamentary supremacy) have been unappreciated, stemming from a formalistic conception of what constitutional supremacy entails. This implicates the Rule of Law since the Constitution, as a form of natural or "higher law" writ positive, is the fundamental and paramount law of the land<sup>206</sup> to which the legislator is subject. As such, a supreme constitution must be distinct from statute, usually by having a special amendment proce-

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202. This is also reflected at the international level. Although Singapore acceded to various human rights treaties, including the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, its obligations only extend to making regular state reports. Singapore has chosen not to ratify the more muscular legal procedures like the Optional Protocol to CEDAW, which would allow 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.

203. PILLAI, *supra* note 51, at 7-8.

204. Hence, the promotion of the Singapore International Arbitration Centre, Small Claims Court which does not involve lawyers, the family courts where mediation and counselling is the preferred means to reaching amicable settlements. Other mediation initiatives in the subordinate courts relate to the provision of a primary dispute resolution centre and two community mediation centres. See J.T.B. Lee, *The ADR Movement in Singapore*, in SINGAPORE LEGAL SYSTEM (Kevin Y.L. Tan ed., 1999, 2nd ed).

205. Mr. Wong Kan Seng advised JB Jeyaretnam to take out an elections petition to an elections judge upon complaining about unfair electoral practices, if he really believed in the Rule of Law. 71 SING. PARL. REP., Nov. 24, 1999 at cols. 611-18. While the Constitution expressly provides for election judges with respect to presidential elections (article 93A), it does not do so for the more important parliamentary elections, whose proceedings are regulated by the Parliamentary Elections Act, c. 218, Part IV (Election Petitions).

206. SING. CONST. art. 4 (Supremacy Clause).



ture. Also, an institution authorised to check on the constitutionality of government acts, usually through judicial review, is needed.<sup>207</sup>

Although formally "supreme" and "rigid," the Constitution in practice has been extremely malleable, amended some thirty-five times since Independence. While the constitution was until 1979 "uncontrolled,"<sup>208</sup> thereafter, a special two-thirds parliamentary majority was required to adopt constitutional amendment bills, rather than a simple majority. The reason for making the Constitution a "controlled" one was that "all consequential amendments that have been necessitated by our constitutional advancement have now been enacted."<sup>209</sup> This is ironic given that the spate of constitutional innovations introduced in the mid 1980s, inaugurating the "constitutional renaissance,"<sup>210</sup> were facilitated by the PAP's parliamentary dominance which made securing special majorities a foregone conclusion.<sup>211</sup> Suggestions to hold referendums on proposed changes like making the presidency elected were rejected on the basis that an elected government had a sufficient mandate to govern as it thought fit.<sup>212</sup> Taken to its logical conclusion, this would mean a government who won the General Election could assume a mandate to change even the constitution's basic structure without further ado, however controversial. Although legal procedures are adhered to scrupulously, the technically "rigid" amendment procedure, designed to enhance mature deliberation, is ineffectual given the political context.

The PAP appears to consider the constitution's easy amendability desirable, as manifested in the history of the elected presidency. Although it was not brought into being by a referendum in 1991, Article 5(2A) provides that where the president refuses to consent to the removal of this office, a two-thirds vote at a national referendum is needed, which would make abrogating or amending the scheme extremely difficult. However, Article

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207. Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L.REV.1, 1-10 (2001).

208. An "uncontrolled" constitution may be amended with a simple majority, the same formal procedural requirement that applies to ordinary laws. *McCawley v. The King*, [1920] AC 69.

209. Law Minister E.W. Barker, SING. PARL. DEB., Mar. 30, 1979, at 296.

210. See L.A. Thio, *Choosing Representatives: Singapore Does it Her Way*, in THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION, (G. Hassall & C. Saunders eds., 1997) at 43.

211. SING. CONST. art. 5(2).

212. See Kevin Y.L. Tan, *The Elected Presidency in Singapore: Legislation Comment and List*, 179 SING J. LEG. STUD. 191-93 (1991). The PAP secured 61% of the vote at the 1988 General Elections and on that basis found a mandate to introduce the elected presidency, which was not an issue raised at the elections.

5(2A), which is a decade old, is still not in effect. Despite assertions that this institution was “carefully drafted, debated over many years and finally passed in 1991,” the government, as its architect, still wishes to shape this constitutional institution.<sup>213</sup> Indeed, significant amendments, which reduced presidential powers, were made in 1994, 1996, 1997 and 1998, with PM Goh explaining that the “reason for not entrenching the institution” was the continuing need for “further fine-tuning to make it workable.” In substance, the constitution bears the quality not of a supreme law but ordinary legislation.

There also does not seem to be much concern about constructing legal guarantees to ensure the integrity of constitutional creations. For example, the Group Representation Constituency (GRC) scheme was originally designed to secure minority representation by requiring that one member of a three-MP team belong to a stipulated minority race. The scheme was later amended to allow for four and up to six MPs per team, with no change to the minority representation quota. If larger sized six-member GRC wards were introduced, the level of minority representation would fall. In October 1996, DPM Tony Tan promised the PAP’s continued commitment to maintain current minority representation levels. However, constitutions are meant to cater to all contingencies and not just current fact situations. Furthermore, it was suggested that legal guarantees rather than government promises provided sounder grounds for ensuring minority rights of participation,<sup>214</sup> with “certainty” constituting an element of even a “thin” Rule of Law.

Secondly, the Constitution has unfortunately in some cases been ignored or discounted. In *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks*,<sup>215</sup> the relevant issue was whether the Military Court of Appeals (MCA) was a “superior court of record” and thus immune to judicial review by the High Court. After reviewing authorities, which included English cases and *Halsbury’s Laws of England*, Sinnathuray J concluded that the MCA was not subject to the High Court’s prerogative writs. The non-consideration of relevant constitutional provisions like Article 93 (judicial power) and Article 9 (right to counsel, habeas corpus) rendered the judicial reasoning deficient. Furthermore, it indicated, perhaps owing to the traditional En-

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213. *SM Lee: Elected President Not the Second Centre of Power*, STRAITS TIMES (SING.), Aug. 12 1999, at 32-33.

214. Chew Sutat, *S’poreans Should Not Rely on Promises to Guarantee Rights of Representation*, STRAITS TIMES (SING.), Oct. 17, 1996 at 46 (stating, “What is the purpose of having a codified Constitution if the de facto operation of the system is based on para constitutional intentions and promises?”).

215. [1984-1985] SING. L. R. 555, [1985] 1 MALAY L.J. 418.

glish legal training these judges received, a lack of constitution consciousness or appreciation of how constitutional values should shape judicial reasoning. Sinnathuray J, who later stressed the importance of considering "local conditions" when interpreting Singapore laws, justified the discounting of English and Canadian contempt-of-court cases on this ground. However, he himself disregarded the most local law of laws, the Singapore Constitution, in *Abudl Wahab*.<sup>216</sup>

Thirdly, constitutional litigation constitutes a minor percentage of the Supreme Court's docket, where commercial cases predominate. This partially flows from unfamiliarity in bringing claims against the state, drawn from domestic or international law. No notion of individual rights as a protective shield against the state exists in the Confucian tradition, where social harmony trumps individual claims. This prioritisation of the collective or public good is reflected in preventive detention laws conferring broad executive power to maintain order, at the expense of criminal process rights.<sup>217</sup>

The SVWP in discussing the individual does not mention the protection of individual autonomy through rights claims. Reference is instead made to "regard" and provide "community support" for the individual, seeking to privatise compassion by spurring community-based groups to look after individual welfare needs. This locates the individual as a part of the community rather than the atomistic being of western liberalism.<sup>218</sup> Furthermore, the state's obligations towards its citizens are couched more in terms of programmatic goals than justiciable entitlement. For example, although certain government policies violate the Article 12 equality clause<sup>219</sup> on the basis of gender, such as the one third maximum ratio of female to male medical students at the National University of Singapore, no constitutional claim has been brought. Furthermore, this policy among others

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216. For a critical comment on the case, see V. Leong and R. Samosir, *Forever Immune? Abdul Wahab Sulaiman v Commandant Tanglin Detention Barracks*, 28 MALAYA L.REV. 303 (1986).

217. For example, the Criminal Law Temporary Provisions Act (CLTPA), Part V allows for the indefinite detention, without a fair trial, of persons "associated with activities of a criminal nature" and the Act itself is renewable before Parliament every five years. The Minister needs the consent of the Public Prosecution with the president's confirmation (acting on the advice of an advisory committee) to detain a person.

218. See, e.g., L.A. Thio, *An i for an I: Singapore's Communitarian Model of Constitutional Adjudication*, 27 H.K.L.J.152 (1997); Zahraiddin-Aravena, *Chile and Singapore: The Individual and the Collective: A Comparison*, 12 EMORY INT'L L.REV. 739 (1998).

219. SING. CONST. art. 12(1) ("All persons are equal before the law and entitled to the equal protection of the law").

may contravene Singapore's international obligations under CEDAW.<sup>220</sup>

The quota rationale is that female doctors are more likely to quit active medical practices upon marriage and motherhood, thus wasting the heavy government subsidies expended on medical education. The Health Ministry in January 2002, in noting changed factual conditions, announced its willingness to review this quota. The discussion was not framed in terms of vindicating gender equality through a rights claim under Article 12 or even CEDAW, but purely in terms of policy, or a state grant, maximising state discretion in considering action. This antipathy towards invoking the idea of rights in discussing state-individual relations is also evident in another instance also involving equality issues. A complaint concerning discriminatory practices based on race and religion was made to the Manpower Ministry. Without referring to rights violation, the Ministry in a press letter stressed the importance of meritocracy to uphold social stability. While stating that the Ministry was investigating complaints, it urged that the best strategy was to educate employers not to make race or religion a chief employment criterion.<sup>221</sup>

The distaste towards "rights talk" as fostering contention manifested in 1997 when an opposition party sought to establish a Malay rights group. PAP MP Yatiman Yusof criticized this as unhelpful and dangerous to racial harmony, possibly precipitating more vocal claims to Chinese and Indian rights. Running programmes that addressed social problems like drug abuse and rising divorce rates were considered a more constructive tack.<sup>222</sup> Similarly, when the *tudung* (Muslim headscarf) controversy of January-February 2002 broke out at a time when race relations were particularly delicate, the government downplayed the prospect of rights litigation. It banned four Muslim schoolgirls from attending public school for wearing headscarves, which breached the educational policy on uniforms. This raised important constitutional issues pertaining to religion and state and the scope of Article 15 (religious freedom). Specifically, it implicated the state's interests in integrating schoolchildren and the right of religious expression in terms of wearing religious clothing in a pub-

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220. G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981), entered into force Sep. 3, 1981. See generally L.A. Thio, *Recent Constitutional Developments: Of Shadow and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs*, SING. J.LEG. STUD. 348-52 (2002).

221. Elaine Swinn-Tan (Assistant Director, Corporate Communications for Permanent Secretary Ministry of Manpower), "Education Can Curb Biases," STRAITS TIMES (SING.), Jan. 28, 1999, at 40.

222. *Malay Rights Group "could damage racial harmony,"* STRAITS TIMES (SING.), June 27, 1997, at 50.

lic educational system. The Prime Minister urged the parents of the schoolgirls to be pragmatic and to send their daughters back to school sans *tudung*, which he argued was not religiously mandated. Conversely, the parents of the suspended schoolgirls considered the policy unconstitutional,<sup>223</sup> and have received the offered services of a Malaysian lawyer.<sup>224</sup> While the government would prefer dialogue to legal action, it has intimated that judicial rulings would be followed.<sup>225</sup>

There have been exceptional public law cases where judgement has been found for the individual over the government. For example, an accused was acquitted of charges under the Official Secrets Act<sup>226</sup> and an applicant successfully challenged the Minister for Manpower's dismissal decision as unjust for breaching natural justice.<sup>227</sup> Thus, there is resort to applications for judicial review to challenge administrative action. However, no distinct administrative law has evolved, as the cases turned on issues of procedural unfairness and failed to develop substantive principles of review such as irrationality and proportionality.<sup>228</sup> Indeed, the courts keenly avoided interfering with issues where the government policy in question implicates national security issues.<sup>229</sup> In *Colin Chan v Public Prosecutor*,<sup>230</sup> the Court upheld, under the Undesirable Publications Act (Cap 338), a blanket ban on the Jehovah's Witnesses (JW) publishing arm (Watchtower)

223. *Third Tudung Girl Suspended*, STRAITS TIMES (SING.), Feb. 12, 2002, at H3.

224. *Karpal to File Papers for Spore Tudung Case*, STRAITS TIMES (SING.), Apr. 20, 2002, at H4.

225. One girl has subsequently returned to school without the headscarf and it remains to be seen whether the case will be litigated. *Tudung Girl's School Return Welcome*, STRAITS TIMES (SING.), June 16, 2002, at 23; *Muslims Urged to Discuss Tudung Issue: Legal Action is Not the Way to Resolve Matters Says MP Zainul Abidin Rasheed*, STRAITS TIMES (SING.), Jan. 28, 2002.

226. *Bridges Christopher v. PP*, [1997] 1 SING. L. R. 406.

227. *Stansfield Business International Pte Ltd v. Minister for Manpower*, [1999] 3 SING. L. R. 742.

228. This may be contrasted with the more vigorous developments in Malaysia. See S. Pillay, *Towards a Re-Formulation of Wednesbury Unreasonableness in Malaysia*, 4 MALAY L.J. cxxi (2000); S. Pillay, *The Ruling in Ramachandran – A Quantum Leap in Administrative Law*, 3 MALAY L.J. lxii (1998); S. Pillay, *The Emerging Doctrine of Substantive Fairness – A Permissible Challenge to the Exercise of Administrative Discretion?* 3 MALAY L.J. I (2001).

229. Writing in 1985, Chinkin noted that despite the high volume of administrative regulation, typical cases involved an individual challenging a specific administrative decision as it affects that particular person." She noted there were no major challenges to the formulation of administrative policy on the grounds that it was *ultra vires* with respect to the constitution, gender biased or involved the unreasonable exercise of discretion. C.M. Chinkin, *Abuse of Discretion in Malaysia and Singapore*, in THE COMMON LAW IN SINGAPORE AND MALAYSIA: A VOLUME OF ESSAYS MARKING THE 25TH ANNIVERSARY OF THE MALAYA LAW REVIEW 1959-1984, 261 (A. Harding ed., 1985).

230. [1994] 3 SING. L. R. 662 (H.C., Sing.).

on the ground that these were contrary to the public interest. The group had been de-registered under the Societies Act (Cap 311) because its pacifist tenets opposed the compulsory military service policy under the Enlistment Act (Cap 93). This ban was content-neutral because it was thought to be administratively inefficient, if not impossible, to evaluate each publication.

#### IV. THE ROLE AND RULE OF LAW AND INSTITUTIONAL DEVELOPMENTS

Singapore has experimented with novel constitutional creations, ostensibly to suit its local circumstances. Notably, these institutions bear the imprimatur of their chief architect, Lee Kuan Yew.<sup>231</sup> In discussing criminal law, the Attorney General affirmed that “Mr. Lee’s vision of how Singapore should be governed in the context of law and order has shaped the criminal justice system, its basic values, principles and objective,”<sup>232</sup> while Tan observed that “symptomatic of Singapore’s legal history is the pre-eminence of Lee in shaping its institutions.”<sup>233</sup>

##### A. THE SINGAPORE APPROACH TO PARLIAMENTARY DEMOCRACY: EVOLVING A SELF-REGULATORY MODEL?

###### 1. *Institutionalised Channels for Dissenting and Alternative Voices: The NCMP & NMP Schemes*

The PAP leadership has sought to manage competitive politics through insisting that only those responsible for public policy, that is, elected representatives, participate in politics and by characterising bipartisanism as destabilizing. Nevertheless, it recognizes the mounting desire for broader definitions of political participation and having a parliamentary opposition presence to ensure a minimal degree of parliamentary scrutiny and debate, rather than merely having PAP backbenchers play-acting the opposition role as in the 1970s.

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231. “From my experience, constitutions have to be custom-made, tailored to suit the peculiarities of the person wearing the suit. Perhaps, like shoes, the older they are, the better they fit. Stretch them, soften them, re-sole them, and repair them. They are always better than a brand new pair of shoes.” Lee Kuan Yew, SING. PARL. DEB., July 24, 1984, col. 1735.

232. *Rethinking the Criminal Justice System of Singapore for the 21st Century*, in THE SINGAPORE CONFERENCE: LEADING THE LAW AND LAWYERS INTO THE NEW MILLENNIUM @ 2020, 31 (2000).

233. TAN, *The Legalists: Kenny Byrne & Eddie Barker*, *supra* note 60, at 89. It was Lee’s idea to change the constitutional amendment procedure, to abolish jury trial, to set up the 1966 Constitutional Commission and to introduce the Elected President, Non-Constituency MP, Group Representation Constituency Scheme into Singapore constitutional law.

Thus, the PAP government amended the constitution to create provisions guaranteeing a perpetual parliamentary opposition presence, also empowering each Parliament to incorporate a slew of non-partisan voices, an advisory panel of sorts.<sup>234</sup>

Introduced in 1984, the Non-Constituency MP (NCMP) scheme heralded a season of constitutional re-ordering, to provide increased opportunities for Singapore citizens to participate in government or through erecting constitutional checks against the Cabinet's untrammelled power. NCMPs were chosen from the top three candidates from opposition parties who, although not managing to win any parliamentary seats, captured at least 15% of their constituency's vote.<sup>235</sup> It did not apply to the top losers from the ruling party, consistent with the scheme's rationale, which included exposing younger, inexperienced PAP MPs to the fires of parliamentary debates.<sup>236</sup> Critics have decried the scheme as a cosmetic lure to distract voters from voting in genuine opposition MPs through the placatory effect of a guaranteed token presence of opposition NCMPs who do not have full voting rights.<sup>237</sup>

In declaring that opposition MPs did not express sufficient alternative views, the government in 1990 introduced the Nominated Member of Parliament (NMP) scheme to fill this lacuna by tapping the expertise of persons unwilling to enter politics.<sup>238</sup> This is predicated on a hapless opposition unable to discharge its office of debate and scrutiny. After 10 years, the NMP scheme is widely regarded as enhancing parliamentary debate, debunking the suspicion that NMPs would be backdoor PAP supporters. However, these remain third class parliamentarians as their democratic legitimacy is suspect. Indeed, the NMP scheme retrogresses to the paternalistic colonial practice of appointing nominated legislative assembly members, drawn from among the better natives. The scheme represents a created exception to the PAP stricture that only politicians should participate in the pol-

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234. See V.S. Winslow, *Creating a Utopian Parliament* 28 MALAYA L.REV. 268 (1984).

235. Article 39(b) provides for a maximum of six NCMP seats while § 52 of the Parliamentary Elections Act (Cap 218) currently allows for three seats. At the 2001 General Elections, opposition politician Steve Chia polled 34.7% of the votes in his contested ward and accepted an NCMP seat in the current Parliament. *Chia's Call - BG Lee Hopes He'll Accept NCMP Seat*, STRAITS TIMES (SING.), NOV. 3, 2001, at 3.

236. See L.A. Thio, *The Post Colonial Evolution of the Singapore Legislature: A Case Study*, SING. J.LEG. STUD. 80, 97-99 (1993).

237. Article 39(2) of the Singapore Constitution provides that NCMPs (and NMPs) cannot vote on constitution amendment bills, supply and money bills and votes of no confidence. SING. CONST. art. 39(2).

238. SING. CONST. art. 39(1)(c). Under the Fourth Schedule, NMPs are to be chosen such that "as wide a range of independent and non-partisan views as possible" be reflected.

icy-making process, with “politicians” equated with political party member,<sup>239</sup> perhaps extended now to include registered civil society groups like the Think Centre or Roundtable.<sup>240</sup> Furthermore, proposals to structure the NMP scheme around selecting people who represent functional groups (labour, business and industry, academia) discounts the scheme’s original rationale for providing non-partisan views, creating the possibility that interest group politics might be injected into the House through non-elected MPs.

Introducing non-elective elements into an elected House may represent an evolutionary shift towards an Asian version of democracy but in reality, it is designed to perpetuate the political status quo characterised by a dominant party controlling Parliament, with a token opposition presence and a pool of government-approved ersatz critics. These developments may minister to desires for dissenting voices, but no real change to political power is effected, as they are oriented towards promoting the workability of a *de facto* one party state. Strong (PAP) government is considered the best guarantor of political stability and these constitutional institutions only make sense operating in such contexts.

## 2. *The GRC Scheme and the Problem of Gerrymandering*

In 1988, the GRC scheme, which allowed multi-member teams to compete in GRC wards, was introduced to Parliament in order to prevent minority under-representation and promote a multi-racial composition. Originally at least one member of the three person team had to be from a designated minority group (Malay, Indian or “Other”),<sup>241</sup> with three former single member constituencies (SMC) being collapsed together to form one mega constituency or GRC.<sup>242</sup> This was supposed to reap economies of scale benefits in relation to for example contracting for public services like garbage disposal (though MPs in adjoining wards could easily band together informally to negotiate better contract

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239. *Join a Party, if You Want to Contribute*, STRAITS TIMES (SING.), Sep. 9, 1993, at 33; *Only Those Elected Can Set OB Markers*, STRAITS TIMES (SING.), Feb. 3, 1995, at 22.

240. Minister Wong Kan Seng had stated previously that “public policy is the domain of government. It isn’t the playground of those who have no responsibility to the people and who aren’t answerable for the livelihood or survival of Singaporeans.” *Asiaweek*, June 15, 1985, at 20.

241. SING. CONST. art. 39A.

242. A voter in a GRC ward casts one vote that will take 4-6 candidates to Parliament while a voter in a SMC casts his one vote for 1 candidate – there is thus a disparity in terms of the power of these votes, a potential breach of article 12 “cured” only by a notwithstanding clause in article 39(A)(3) of the Constitution. SING. CONST. art. 39(A)(3).



terms). Eventually, the team size was enlarged to include from four to six members who must all belong to the same political party (or be independents), thereby buttressing the ties of politicians to their political party. Indeed, the GRC scheme allowed the PAP to effectively introduce new PAP candidates with nearly no political experience into Parliament, by placing them in a team anchored by a strong ministerial candidate. In effect, the public votes for the political party, not individual candidates, many of whom have to retrospectively cultivate grassroots links.<sup>243</sup>

Today, GRC wards dominate the political landscape. Section 8A of the Parliamentary Elections Act provides for a minimum of 8 SMCs. In 1988, there were thirteen three-member GRCs (yielding 39 MPs). During the 2001 General Elections, there were a total of nine SMCs (all contested), and of the fourteen GRCs, only four were contested (twenty seats), which meant that the PAP enjoyed a walkover in ten GRCs (yielding fifty-five seats). Since 1988, opposition parties struggled to find candidates of the right racial mix to contest more than a few GRCs, never having won one. Though theoretically neutral insofar as opposition politicians could win six seats at one fell swoop, in practice the GRC scheme entrenches the incumbent party.<sup>244</sup> PM Goh stated that the scheme promoted a more stable political system by encouraging voters not to vote for opposition candidates but for candidates they had faith in (i.e. PAP candidates), stultifying the prospect of freak election results (voting in large number of opposition MPs), eroding the mandate of government and keeping out key Cabinet members. Notably, the rationale of entrenching multi-racialism could be just as easily effected by the original 1982 “twinning” proposal whereby two constituencies would be joined and jointly contested, with one member of the two-member team being a minority.<sup>245</sup> This would enhance elec-

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243. For example, in the 2001 General Elections, two newcomers who were later appointed ministers of state, Vivian Balakrishnan (Holland-Bukit Panjang) and Raymond Lim (East Coast) stood in uncontested GRC wards. On November 23, 2001, at the swearing in ceremony of the new Cabinet, the president noted that the new MPs had to “establish rapport with Singaporeans at the grassroots” and during their five year term, “they must sink roots in their constituencies and establish themselves as leaders of their communities.” <http://www.gov.sg/istana/sp-011123.html>.

244. For his illuminating analysis on how the GRC affects election strategies and operate in practice, see Kevin Y.L. Tan, *Constitutional Implications of the 1991 General Elections*, 26 SING. L.REV. 46 (1992).

245. However, other programmes have since been attached to the GRC scheme like Town Councils (estate management) and the Community Development Council (“CDC”) which looks after residents’ welfare at the grassroots level through disbursing educational subsidies for example. They pile a whole host of other functions on the GRC scheme, not all of which are naturally aligned. However, they provide additional reasons for not dismantling the GRC scheme. The CDCs’ functions are

toral competitiveness and render the system more closely aligned to the democratic ideal that government is composed of candidates who contest for votes, their source of legitimate authority, rather than a government which is formed mainly through default. The Parliamentary Elections Act makes provision for uncontested wards, though the GRC in apparently promoting stability sacrifices the democratic principle in muting genuine voter choice.

The readiness to forsake principle or legitimacy issues for expediency or stability is evident on two further counts. First, although GRCs are contested by teams, there is no obligation to hold by-elections when the team diminishes in size through death or resignation. For example, a PAP member resigned from the Jalan Besar GRC after a criminal fraud conviction. The PM decided against holding a by-election as this distracted from the imperative of economic recovery measures. The vacancy was thus left unfilled, there being no felt need to seek a fresh mandate from constituents after the team they voted in technically ceases to exist.<sup>246</sup> Secondly, the Minister under the Parliamentary Elections Act is empowered to delimit electoral boundaries and this is done regularly prior to general elections, resulting in the *quiescens* of many marginal wards: Anson, Cheng Sanand Eunus. An aspect of the Rule of Law is certainty, which is absent where opposition politicians cultivating support in a certain ward discover its demise with little notice prior to a General Election.<sup>247</sup> It is insufficient to protest that the boundaries are drawn by an *ad hoc* Electoral Boundaries Review Committee, as the committee is composed of civil servants working under the Prime Minister's Office. Singapore has not reached a state of sufficient political maturity where the assumption that civil servants hold no preferential bias for their political masters may be sustained.<sup>248</sup> This practice raises the desirability of an independent

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laid out in People's Association Act (C. 227) (Community Development Councils Rules), Mar. 29, 1997.

246. *Why no By-Election? PM Must Explain Says WP Chief*, STRAITS TIMES (SING.), June 19, 1999, at 48; *By-Election Secondary to Crisis Recovery*, STRAITS TIMES (SING.), June 5, 1999, at 2.

247. For example, Mr. Christopher Neo of the SDA found that the Bukit Gombak ward, whose ground he had been working, was swallowed up into a GRC two weeks before polling day. *More Level Playing Field Needed, to be Fair*, STRAITS TIMES (SING.), Nov. 11, 2001, at 42.

248. *Singapore Yet to Attain Political Maturity, Says Walter Woon*, STRAITS TIMES (SING.), Nov. 20, 1992, at 31. At a press conference on July 16, 1999, out-going President Ong Teng Cheong spoke of difficulties encountered during his term of office, urging that civil servants needed a mindset change and should be more co-operative in reporting to the President any expenditures impinging on national reserves, rather than viewing the President as troublesome. Goh Chok Tong, 70 SING. PARL. REP., Aug. 17, 1999, cols 2031-35, in replying to implicit criticism of his government.

elections agency which draws boundaries based on logical and demographical criteria, rather than expediency, without unduly stifling democratic principles.<sup>249</sup>

### 3. *Me and My Shadow: The Lifting of the Whip*

After triumphantly winning eighty-two of eighty-four parliamentary seats in the 2001 General Elections, the government mooted the idea of having a shadow cabinet composed of twenty PAP parliamentarians whose function would be to robustly criticise cabinet policy without the Whip's muzzle.<sup>250</sup> This would enliven debate and dispel the monolithic reputation of Parliament.

This is another suggestion in a long line of developments preferring a mode of internal regulation or self-restraint in framing politics and the decision-making process.<sup>251</sup> Parliament is cast not as a competitive political site but a place to fine-tune policy, conducted by in-house critics. However having a "People's Action Forum" composed of PAP MPs checking other PAP MPs is inherently limited,<sup>252</sup> and is likely to nurture a more consensual than confrontational style of government.

## B. THE ELECTED PRESIDENCY AS A MECHANISM OF CONTROL

The 1991 transformation of the ceremonial presidency into an elective office was designed to enlarge the President's constitutional role in governance. Its chief architect Lee Kuan Yew considered that when freak elections occur,<sup>253</sup> the Elected President (EP) should serve as the custodian or 'second key' over the nation's financial reserves in order to mitigate the risk of fiscal mismanagement. Also, the EP should serve as a watchdog over corrupt or nepotistic key public appointments.<sup>254</sup> This concept was thus long-term in orientation, the stuff of constitutional

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249. *Should S'pore Have an Independent Elections Agency?*, STRAITS TIMES (SING.), Dec. 22, 2001, at H10-11.

250. This is, of course, a misappropriation of nomenclature, as the "shadow cabinet" in a Westminster system of government is understood as the leading parliamentary opposition group who have shadow portfolios and who are literally waiting in the wings to assume government if the next election should so empower them.

251. Other self-regulatory restraints being the NMP scheme, the Government Parliamentary Committee scheme, or the past function of PAP backbenchers as internal critics. See Kevin Tan, *Parliament and the Making of Law in Singapore*, 123-59 (Kevin Tan ed., 1999).

252. *Can a Shadow Play Have Real Impact*, STRAITS TIMES (SING.), Dec. 15, 2001, at H16-17.

253. S.M. Lee, *Elected President Not the Second Centre of Power*, STRAITS TIMES (SING.), Aug. 12, 1999, at 32-33.

254. See generally MANAGING POLITICAL CHANGE IN SINGAPORE: THE ELECTED PRESIDENCY, *supra* note 81.

checks in contemplating the possibility of an errant future cabinet government wielding untrammelled power. The EP was not designed to be an executive head of state after the Gaullist model; the enlarged powers were negatively or reactively couched in “veto” terms. This was nevertheless a genuine discretion, departing from the constitutionally recognised Westminster convention that the President “acts on the advice of the Cabinet.”: Article 21(1).

The EP scheme was presented as an institutional check with the government as author, “clipping its own wings” in anticipation of a possible future “weak or bad government ruining Singapore.”<sup>255</sup> To ensure independence, party political membership was prohibited. A legal system cannot guarantee good men or Confucian *junzi* in perpetuity, which depends on extra-legal factors. However, the perceived importance of the EP’s new role was reflected in the filtering process and stringent pre-selection criteria for candidates administered by the three-man Presidential Elections Committee (PEC).<sup>256</sup> Candidates had to convince the PEC that they were persons of “integrity, good character and reputation.” A highly subjective contrary finding might be defamatory and thus, the PEC was conferred immunity in this respect.<sup>257</sup> Additionally, candidates must satisfy more exacting criteria than that required of a MP or Prime Minister, who holds the chief reins of political power, or that required of the US President! For example, Article 19(2)(g) requires that a candidate must either hold high political office in the vein of “Minister, Chief Justice, Speaker, Attorney General, Chairman of the Public Service Commission, Auditor-General, Accountant-General or Permanent Secretary.” Or alternatively, a candidate must have been the Chairman or CEO of a company with a paid-up capital of at least SGD 100 million. This limits the right of candidature, skewing this elite pool towards a pro-establishment bias. Indeed, these qualifying criteria, ensuring candidates of high moral standing and financial expertise, would seem to embody the PAP *junzi*. The institution embodies fiscal conservatism, a characteristic of both Confucian values and the Protestant work ethic.

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255. P.M. Goh Chok Tong, SINGAPORE PARL. DEB., OCT. 4, 1990 at cols. 462-63 & 469.

256. SING. CONST. art. 18.

257. Presidential Elections Act § 8A. In 1999, the PEC granted only SR Nathan an eligibility certificate, refusing the requests from private tutor Ooi Boon Ewe and opposition politician Tan Soon Phuan. The PEC is not obliged to give reasons in its decisions and is thus unaccountable. *Only Nathan Gets Eligibility Cert.*, STRAITS TIMES (SING.), Aug. 18, 1999, at 2.

The chief concern was whether this institution would be an effective check. Additional veto powers relating to detention orders and restraining orders issued under the Internal Security Act (ISA) (Cap 143) and Maintenance of Religious Harmony Act (MRHA) (Cap 167A) were later pegged on to the EP's bundle of powers.<sup>258</sup> However, the EP is bounded by having to work in tandem with a Council of Presidential Advisors (CPA) or other civil servants. The EP's powers are not initiatory and may be overridden. For example, the EP may refuse to make certain public appointments under Article 22 after consulting with the relevant authority. However, if the CPA's recommendation differs, the EP's decision may be overridden by a two-thirds majority parliamentary resolution. If the PM refuses to give the Director of the Corrupt Practices Investigation Bureau consent to conduct an investigation, the Director may proceed with the EP's concurrence under Article 22G. Thus, the EP's powers are exercised by committee.

The scope of the EP's powers has stirred controversy, culminating in the seminal 1995 constitutional reference.<sup>259</sup> Since its inception, the EP's powers have been further limited by subsequent constitutional amendments.<sup>260</sup> Thus, although the EP scheme was based on a "two keys" principle (cabinet and EP), "the Government gave the President the second key but changed the locks."<sup>261</sup> It has been admitted that the EP's role is "mostly 99% ceremonial as before" in the absence of a rogue government.<sup>262</sup> With the gradual truncation of this youthful institution's power and its limited role, the strict EP qualifying criteria seem

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258. That it was "pegged on" is evident in that judicial review had just been ousted under these Acts and there was a need for some sort of a substitute check. The EP's role under the MHRA was being discussed while the EP Bill was before the House. 56 *MRHA Bill (Third Reading)*, SING. PARL. REP., Nov. 9, 1990, at col. 596-97. Though the EP must have financial expertise, as the qualification criteria requires, human rights expertise is not mandated. On the EP scheme, see Kevin Tan, *The Presidency in Singapore: Constitutional Developments*, V.S. Winslow, *The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid*, L.A. Thio, *The Elected President and the Legal Control of Government: Quis Custodiet Ipsos Custodiet?*, in *MANAGING POLITICAL CHANGE IN SINGAPORE*, *supra* note 81.

259. For a discussion, see L.A. Thio, *Working out the Presidency: The Rites of Passage*, SING. J.LEG. STUD. 509 (1995); for a reply, see Attorney-General SK Chan, *Working out the Presidency: No Passage of Rights*, SING. J.LEG. STUD. 1-39 (1996).

260. For example, a 1994 amendment removing Presidential review over "defence and spending" measures. SING. CONST. art. 151A.

261. Low Thia Khiang, *quoted in, Govt not Sincere, Says Opposition*, STRAITS TIMES (SING.), Aug. 19, 1999, at 29.

262. *Knowing President's Limits*, STRAITS TIMES (SING.), Aug. 12, 1999, at 32 (Interview with Lee Kuan Yew, agreeing with the Straits Times assessment).

disproportionate and the filtering process unnecessary, given this institution's marginal role.<sup>263</sup>

### C. OUSTING JUDICIAL REVIEW – THE MOVE TOWARDS NON-LEGAL OR BUREAUCRATIC CONTROL

In an important statement of principle, the Court of Appeal in *Chng Suan Tze v. Minister of Home Affairs* in rejecting the subjective test precluding review of a ministerial statutory discretion declared: “[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.”<sup>264</sup>

However, Singapore retains an array of laws allowing the curtailment of individual liberties without judicial redress so as to serve the imperative of the broadly defined idea of “public order.” These ouster clauses effectively concentrate unchecked power in executive hands, and it is clear that there is a felt need to provide a substitute check wielded by non-legal forms of control and through political bodies like the EP or advisory councils, which is composed of bureaucrats or in some instances, religious and civic society leaders. However, are these checks sufficiently muscular?

#### 1. MRHA and Restraining Orders

Among these laws are the Maintenance of Religious Harmony Act (Cap 167A) which allows the minister to issue preemptive “restraining orders” to “gag” politicians or religionists thought to be mixing a volatile cocktail of religion and extremist

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263. EP Ong Teng Cheong, a former Cabinet Minister had shown by his tenure that the office could be an independent, albeit weak, one. In a press interview, he detailed the problems he had encountered during his presidency, including the apparent lack of co-operation from various government offices. For example, the Accountant-General seemed reluctant if not unable to handle his request for a statement of all government assets he was elected to protect. The Prime Minister felt compelled to address the EP's criticisms in Parliament over fundamental matters like defining national reserves. A lasting legacy of the Ong presidency was the production of a binding White Paper on Safeguarding Accumulated Reserves, which sets out the principles to be observed in regulating past reserves. 70 SING. PARL. REP., Aug. 18, 1999 at col. 2207ff. He broke new ground in asserting the right to differ and to be seen to be so doing. Cherian George, *The Ong Presidency*, SUNDAY Times (Sing.), Aug. 29, 1999, at 37.

264. [1988] SING. L. R. at 156B-C. This decision was legislatively overruled a few weeks later by an amendment to the Internal Security Act (Cap. 143) in January 1989 which reinstated the “subjective” test of review with respect to ISA decisions as applied in *Lee Mau Seng v. Minister of Home Affairs* 2 MALAY L. J. 137 (1971). For a discussion of this development, see L.A. Thio, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam*, SING J. LEG. STUD. 240, 241-46 (1997).

politics, which could escalate racial-religious tensions, a recurrent bugbear. Even though such an order can curtail both freedom of expression and freedom of religion rights, judicial review is precluded, because "religious harmony" issues are considered to be non-justiciable, the apt province of the Executive, and indeed, "crucial for our survival as a nation."<sup>265</sup> Judicial review in an open court was thought undesirable as "a secular court deciding on religious disputes" would be "explosive."<sup>266</sup>

There were concerns, particularly among Catholics and Protestants, that the Act was just another tool in the government's arsenal of control techniques which could quench political dissent stemming from moral conviction.<sup>267</sup> Although some considered this "a far kinder, gentler approach,"<sup>268</sup> and trusted in the Minister's prudence and good faith in exercising his wide-ranging powers, there remained the need for a check. This was provided through empowering the EP under Article 22I to refuse to confirm or cancel a restraining order. However, this power was only activated where the recommendations of the President of the Council for Religious Harmony (composed in part of religious representatives) contradicted the Cabinet's advice. These checks may temper the subjectivity of the Minister's discretion, but the ultimate check is the blunt political check of the people's judgment in electing men of integrity.<sup>269</sup>

## 2. *ISA and Preventive Detention Orders*

More notorious are Singapore's preventive detention laws like the Internal Security Act (Cap 143), allowing detention without trial of persons suspected of acting in a manner prejudicial to Singapore's security.<sup>270</sup> Detention orders may be renewed every two years and in its most draconian effect, has authorised the twenty-three year detention without trial of alleged communist insurgent Chia Thye Poh.<sup>271</sup>

The detention order has primarily been unleashed against "communist" insurgents and drug traffickers. This is a "blatant

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265. Prof. Jayakumar, *MRHA Bill, Third Reading*, 56 SING. PARL. REP., Nov. 9, 1990 at col. 599.

266. Dr. John Chen, 54 SING. PARL. REP., Feb. 22, 1990, at col. 1128.

267. Dr. Aline Wong, 54 SING. PARL. REP., Feb. 22, 1990, at cols. 1075-76.

268. *Id.* at col. 1076.

269. Prof. Jayakumar, 54 SING. PARL. REP., Feb. 22, 1990, at col. 1205.

270. Others include the Criminal Law Temporary Provisions Act (Cap 67) and Misuse of Drugs Act (Cap 185).

271. Chia was a former Barisan Socialis member of Parliament and was detained on October 1966 at a demonstration protesting US involvement in Vietnam. He never admitted to being a member of a communist party. *Letters: Bogus Reasons for 22-Year Detention*, FAR E. ECON. REV., Nov. 16, 1989.

negation of the Rule of Law,"<sup>272</sup> as it mandates punishment through deprivation of liberty without a judicial determination that it is merited. The exercise of ISA powers, whose precursor was the colonial Preservation of Public Security Ordinance, an Emergency Measure, against non-violent dissenters, has attracted considerable internal and external criticism. The most notable instance is the detention in 1987 of twenty-two so-called Marxist conspirators, including church workers, student organisers and other social activists, where no threat of violence was involved, for an alleged plot to subvert the socio-economic system and establish a communist state. Scepticism about the necessity of detention was widespread and some of the detainees gave harrowing accounts of maltreatment amounting to torture while in detention, where attempts were made to extract forced confessions.<sup>273</sup>

However, the usual Western critics hailed rather than condemned the latest exercise of ISA powers in December 2001 to arrest fifteen people suspected of belonging to a fundamentalist Islamic terrorist group, the *Jemaah Islamiyah* (JI) which had links with Al Qaeda and Osama bin Laden.<sup>274</sup> In a post 9-11 world, western democracies find themselves grappling with the need for special powers to handle security threats, without unduly sacrificing civil liberties.

Evidence relating to the Yishun MRT station, US and Israeli properties bomb plot was uncovered and made public.<sup>275</sup> Given the delicate race relation issues with respect to Singapore's Muslim minority, the government, though not constitutionally obliged to,<sup>276</sup> endeavoured to supply information on the arrests, held public meetings<sup>277</sup> to engage concerned parties in dialogue

272. J.B. Jeyaretnam, 71 SING. PARL. REP. ., Nov. 24, 1999, col. 576 (stating that the ISA shows that "even an Act of Parliament can violate the Rule of Law.").

273. See FRANCIS SEOW, *TO CATCH A TARTAR: A DISSIDENT IN LEE KUAN YEW'S PRISON* (1994).

274. *Pentagon "Pleased" with S'pore's Response*, STRAITS TIMES (SING.), Jan. 13, 2002, at 6. Ironically, opposition politician JB Jeyaretnam argued that Singapore should not be influenced by the US decision to allow secret military tribunals to try non-citizen terrorists, and urged an open trial of the terrorists who could be charged under Penal Code § 125 (waging war); § 425 (mischief). *Should Detainees Face an Open Trial*, STRAITS TIMES (SING.), Jan. 26, 2002.

275. See L.A. Thio, *Recent Constitutional Developments: Of Shadow and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs*, SING. J.LEG. STUD. 328, 328-73 (2002).

276. Article 151(3) allows authorities not to disclose facts where this would be against the national interest. SING. CONST. art. 151(3).

277. No public meetings were held with respect to the 1987 detentions, apparently because it was felt that letters released to the press by certain detainees denying the veracity of their confessed involvement in the conspiracy constituted political propaganda. Conversely, in 2001 leading government leaders held closed door sessions with community and religious leaders to address public concerns over the ar-



and has taken steps to appear supportive of the detainees' families.<sup>278</sup> This includes the release of reconnaissance video clips taken by JI members of strategic locations like the American and British Embassy, made in October 2001.<sup>279</sup> This strategy provided some measure of accountability and transparency, allaying public fears and diffusing emotional reactions.<sup>280</sup>

This gentler approach seeks to appease majority-minority tensions, and is in stark contrast with the callous handling of the so-called Marxist conspirators some fifteen years earlier.<sup>281</sup> The Home Affairs Ministry also released a summary of its case against the detained which was published in the paper,<sup>282</sup> in an attempt to keep Singaporeans fully informed of the on-going investigations and even briefed schools on the arrests.<sup>283</sup>

Under the ISA, an Advisory Board, before whom detainees may make representations, must be constituted to hear these representations and make recommendations to the President if the detainees are to be detained beyond three months.<sup>284</sup> The Board

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rest of fifteen people. *Ministers Hold Sessions on ISA Arrests*, STRAITS TIMES (SING.), Jan. 25, 2002, at H5.

278. *ISA Detainees Co-operative, Coping Well*, STRAITS TIMES (SING.), Jan. 24, 2002, at H4. The newspapers reported that detainees were allowed weekly familial visits and were allowed to fulfill their religious obligations. Minister Wong Kan Seng also spoke of Internal Security Department Officers forming family support groups to get in touch with families/wives of detainees and allay fears of government persecution. *Don't View Muslims with Suspicion. . . Carry on Life as Before*, STRAITS TIMES (SING.), Feb. 1, 2002, at H10-11.

279. *More Videotape Evidence of Terror Plot Here*, STRAITS Times (Sing.), Mar. 2, 2002, at 3.

280. At the opening of the ISD heritage centre, Minister Wong Kan Seng said that in relation to the Jemaah Islamiah arrests the Government decided to make public as much information as possible without compromising investigations so as to "ensure that both Muslims and non-Muslims did not react in emotional and distorted ways which could undermine ethnic trust and social peace." *Museum to Give a Glimpse of ISD Work*, STRAITS TIMES (SING.), Mar. 21, 2001.

281. During the 1987 debates on ISA actions, no PAP MP opposed the detentions, only the Opposition MPs like Chiam See Tong. He asked PAP MPs to "contemplate what this Government has done to eight hapless Singaporeans? What are their crimes? Have they been found with knives, guns, grenades, mortars and other implements of war?" 51 SING. PARL. REP., May 31, 1988, at col 238. He also asked that officials meet with families to answer their queries and perhaps face their anger. *Id.* at col. 239. Calls were also made for a public inquiry, upon hearing of allegations of mistreatment under detention and Chiam asserted the majority were sceptical about the arrests. *Id.* at col 241. PAP MPs were dismissive about meeting the detainees' families. *Id.* at col 240. Moreover, they thought no public inquiry was needed, since the government had won the General Election during which the government had campaigned on retaining the ISA. *Id.* at col. 249.

282. *The Case Against the Jemaah Islamiah*, STRAITS TIMES (SING.), May 31, 2002, at H2.

283. *Schools Get Guide to ISD Arrests*, STRAITS TIMES (SING.), Jan. 13, 2002, at H1.

284. SING. CONST. art. 151(1), (2). Under the 1955, Preservation of Public Security Ordinance, detention orders had to be renewed every three years. There was an

is composed of three persons, including one qualified to be a Supreme Court judge, who are appointed by the President in consultation with the Chief Justice. While this provides for a judicial element insofar as having a trained lawyer sit on the Board, it is not the same as an open court trial where evidentiary and criminal procedure standards apply and natural justice rules protect the accused. But then, the whole point of preventive detention is to permit detentions for expedient reasons, or where there is insufficient proof to bring criminal charges.<sup>285</sup> In May 2002, the Board recommended detention of the thirteen until at least January 2004 as they posed an active threat to Singapore that had to be neutralised and permitted investigations to ferret out their network to continue.<sup>286</sup> Details of the threat's nature were publicly released to buttress the creditability of the detentions.

Despite Communism's demise as a viable social threat, the ISA has not fallen into desuetude, but it is cast as a necessary and efficient tool given its broad powers, against new security threats like terrorism, especially the fundamentalist Islamic variety.<sup>287</sup> Indeed, the ISA is being rehabilitated to dispel its image as an oppressive tool used to intimidate opposition politicians, cowing the population into docility and submission.<sup>288</sup> Rather, it is presented as a nation-building and security preserving tool, with

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Appeal Tribunal which is more powerful than the current Advisory Board, composed of two High Court and one District Judge who had power to order release. It was the PAP who in 1959 changed the Tribunal to the Advisory Committee with recommendatory powers only. *NEW YORK BAR RECORD*, *supra* note 2, at 22. For an overview of ISA Law, see Yee, Ho & Seng, *Judicial Review of Preventive Detention under the ISA*, 10 *SING. L. REV.* 66 (1989).

285. In 1989, Lee Kuan Yew stated that the ISA serves Singapore's political stability well, and that "It is not a practice, nor will I allow subversives to get away by insisting that I've got to prove everything against them in a court of law or evidence that will stand up to the strict rules of evidence of a court of law." *STRAITS TIMES* (SING.), June 5, 1987.

286. *Review Board Upholds ISA Detentions*, *STRAITS TIMES* (SING.), May 31, 2002, at 6. It was reported that after a four day hearing where detainee statements were taken before a District Court Judge and some fifty-six exhibits considered, including seized documents and video recordings, a ninety page submission had been made to the President. The report contained information about the detainees' admission of involvement in terrorist activities, their perception that America and Israel and its allies were "enemies of Islam" and the testimony of four witnesses, including one who was approached by a detainee to buy seventeen tonnes of ammonium nitrate, a bomb-making ingredient. *Id.*

287. See President's Address at the Opening of the Tenth Parliament, Mar. 25, 2002, <http://www.gov.sg/istana/sp-020325.html> (warning of the spread of a narrow, radical interpretations of Islamic in South East Asian countries and its possible effects on Singapore's multi-racial polity).

288. See *Removal of Fear in People's Lives*, 69 *SING. PARL. REP.*, July 31, 1998, at col 675-84; Asia Watch Report, *SILENCING ALL CRITICS: HUMAN RIGHTS VIOLATIONS IN SINGAPORE* 1-32 (1989).

the establishment of an ISA heritage centre<sup>289</sup> and an information book to be published.<sup>290</sup> Nevertheless, preventive detention laws while upholding one aspect of the Rule of Law—public order, is deleterious to another aspect – effective checks on broad discretionary powers. Coupled with the broad understanding of “public order” which does not necessarily involve violence, it is hard to differentiate between using the ISA for genuine security and for self-interested political purposes.

### 3. Chng Suan Tze, *the Truncation of Judicial Review and “Freezing” of the Common Law*

The Amendments to the Internal Security Act in January 1990, severely truncating the judicial role in relation to detention orders, was a direct response to the seminal Court of Appeal decision in the case of *Chng Suan Tze v. Minister of Home Affairs*, delivered on 8 December 1988.<sup>291</sup>

After a well-reasoned, careful examination of Commonwealth precedents, the Court decided, as a matter of principle, that an objective test of review applied even though section 8 authorises the issuing of detention orders in subjective terms (“if the President is satisfied” that security is imperiled).<sup>292</sup> Otherwise, there would be no limit on arbitrary exercises of powers which severely curtailed Part IV constitutional liberties. In so doing, it overruled the subjective approach adopted in the 1971 case of *Lee Mau Seng v. Minister for Home Affairs*.<sup>293</sup> The Court affirmed its institutional role as guardian against intrusions on individual liberties, while importing the doctrine of justiciability, a form of judicial self-restraint, which recognizes that the judiciary should not trespass into the executive realm when politically sensitive issues were at stake.<sup>294</sup> Subsequently, the detention orders against four detainees who were appealing the dismissals of their habeas corpus petitions, were quashed on technical

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289. *Museum to Give a Glimpse of ISD Work*, STRAITS TIMES (SING.), Mar. 21, 2001.

290. *Book on ISA to Be Released Later This Year* STRAITS TIMES (SING.), Apr. 14, 2002.

291. [1988] SING. L. R. 132; [1989] 1 MALAYA L.J. 69.

292. Review could be made on the basis of precedent fact review and the *GCHQ* grounds ([1985] AC 374) of illegality, irrationality and procedural impropriety. For a discussion of this decision, see L.A. Thio, *Trends in Constitutional Interpretation: Awakening Arumugam, Oppugning Ong?*, SING J.LEGAL STUD. 240 (1997).

293. [1971] 2 MALAYA L.J. 137. For a comment, see Daw, *Preventive Detention in Singapore* [1972] 14 MALAYA L.REV. 276.

294. The Court said that in cases where national security issues were concerned, while it would not evaluate the nature of the evidence, it would require that the decision in question was in fact based on national security considerations, rather than on bad faith or caprice. [1989] 1 MALAYA .L.J. 69, 83F-H.

grounds, although the relevant detainees were expeditiously re-detained under fresh orders, signed by the correct official and served as they passed through the prison gates.<sup>295</sup>

The decision sufficiently discomfited the government which legislatively overruled *Chng* through amending the constitution and ISA. The amended section 8 of the ISA provided that the applicable test for judicial review, broadly defined in section 8A to include prerogative writs and habeas corpus petitions, was to be the law applicable in Singapore as of July 13, 1971 for reviewing ISA decisions. This was the date of the *Lee Mau Seng* case, representing an attempt to “freeze” the common law, whose very nature is to evolve incrementally, legislatively stipulating the subjective test of review. Notably, this was the test approved in the British wartime case of *Liversidge v. Anderson*,<sup>296</sup> where Lord Atkins in a renowned dissent later vindicated in most Commonwealth jurisdictions (including *Chng*), rebuked his brother judges for being “more executive minded than the executive.” Thus, a common law test formulated during World War II, when public order was imperative, was thought appropriate for peacetime Singapore. Furthermore, section 8B(2) limited review only to ensuring compliance with procedural requirements. Bearing in mind that ISA-related appeals to the Privy Council were excluded, this meant that the executive possessed a draconian power without any substantial checks, aside from the non-binding recommendations of the Advisory Board. Furthermore, Article 149 of the Constitution was amended to include a “notwithstanding clause.” This had the effect of exempting anti-subversion laws enacted under Part XII (Special Powers against Subversion and Emergency Powers) from the operation of various constitutional provisions, including Articles 9 (life and liberty), 11 (retrospective laws), 12 (equality), 13 (banishment and free movement) and 14 (free speech, association and assembly). Furthermore, such laws were deemed not to be outside legislative power. Effectively, where the making of such “special Powers” laws is concerned, the Constitution is not supreme, Parliament is. While the power may be exceptional, the danger is that the grounds for making such laws are drafted extremely broadly.<sup>297</sup>

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295. NEW YORK BAR RECORD, *supra* note 2, at 35.

296. [1942] A.C. 206 (U.K.).

297. Grounds include Acts that address fears of “a substantial number of citizens” with respect to “organized violence against persons or property,” instances where disaffection against the President or Government is excited, where “feelings of ill-will and hostility between different races” likely to cause violence, and action “prejudicial to the security of Singapore.” SING. CONST. art. 149(1)(a)-(e). Notably, the Court has since favored an open-ended approach, which maximizes executive

The reasons proffered before Parliament by Home Affairs Minister Jayakumar for these amendments are instructive with respect to the (marginalised) role of law in security matters, where trust in executive judgement and good faith is paramount. First, the Court of Appeal was thought to have been unduly influenced by foreign cases decided by interventionist courts, thus, the need to “restore” the subjective test.<sup>298</sup> He asserted that since the colonial era, “the Executive alone has been responsible for decisions on national security” and that in the English “GCHQ case,” the courts had recognised that the judicial process was not suited to dealing with national security-related problems: “[T]he Executive . . . must take pre-emptive action based on security assessment by the professionals of the ISD. It is not a judicial decision nor does it lend itself to the judicial process [or] . . . objective evaluation by the courts.”<sup>299</sup>

This too the Court of Appeal had acknowledged, but rather than trusting judges to exercise judicial self-restraint, Parliament preferred the externally sanctioned restraint of ouster clauses. Certainly, the “foreign cases” were adopting a more protective pro-individual bias in their reasoning but this was considered unsuitable for Singapore, in preference of an authoritarian style of unaccountable executive control reminiscent of colonial laws.<sup>300</sup> Thus, Singapore should not “be governed by cases decided abroad” on national security matters;<sup>301</sup> in other words, it should eschew the more pro-human rights approach manifested by UK courts, under the influence of the European Court of Human Rights. The Minister’s view was that Singapore was developing its own unique version of the common law, distinct from developments in other Commonwealth jurisdictions.

Along these same lines, in explaining why appeals to the Privy Council in security matters were being abolished, the Minister said that as an independent country, it should decide its own national security matters:

Economic, social and political conditions of Singapore and United Kingdom are in fact divergent. . . Matters of public law, especially defence and security, are very crucial for the sur-

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discretion in this regard: “Parliament has not sought in the ISA to define activities which are prejudicial to the national security. It is for the executive to determine as a matter of policy and judgment whether certain activities are prejudicial to national security. *J. Chua, Teo Soh Lung v Minister for Home Affairs* [1989] SING. L. R. 499, 508B.

298. S. Jayakumar, SING. PARL. DEB., Jan. 25, 1989 at cols. 532 & 467.

299. JAYAKUMAR, *supra* note 296, col. 527.

300. Jayakumar affirmed that the Government’s position on the judicial role in security matters was consistent with that articulated in October 1959 when Singapore was still a self-governing colony. *Id.* at col 470.

301. JAYAKUMAR, *supra* note 296, at col. 468.

vival of any country. So not only must our laws meet our different circumstances but [they] must be interpreted by our own judges, people who are part of our society, judges who are aware of our history and of our conditions [rather than] . . . a body of UK judges sitting in the United Kingdom thousands of miles away, who really have no knowledge of . . . our circumstances.<sup>302</sup>

Thus, the Minister considered that *public* laws (since Singapore commercial law is essentially based on the British model) had to be interpreted “in the context of social, economic and political circumstances of a given society” and not *in vacuo*, and therefore judges needed familiarity with local conditions.<sup>303</sup> With respect to the view that broad ISA powers could be abused, particularly with the excision of a substantive judicial check, the Minister dismissed a judicial solution, arguing that a bad government could abuse *all* discretionary powers and indeed “pack the courts,” rendering the judicial remedy “highly illusory.”<sup>304</sup> While acknowledging that freak elections could oust a PAP government, the Minister was content to identify the best safeguard against abuse as inherent in the people “to ensure that the Government elected is composed of men of integrity, honesty and incorruptibility.” This was a far more optimistic view than the pessimism expressed twenty-two years ago, when Jayakumar disagreed with the view that governments would not abuse vast powers since “the system of representative government itself ensures that the government would not abuse these powers due to fear of castigation by the electorate at the next elections.” He stated,

[I]f indeed we were to make this assumption, then there would be no need for a written constitution. I am not prepared to assume that there will never come into power an authoritarian, arbitrary government. In such a situation, it would be paradoxical if such a government could justify any of its oppressive measures by reference to the Constitution itself. It is precisely in order to *avoid* contingencies such as that that written constitutions are first sought.<sup>305</sup>

This amendment which entailed the loss of constitutional safeguards and appeal to the Privy Council prompted the *Wall Street Journal* to characterize it as something “harkening back to sometime before King John issued the Magna Carta in the year

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302. JAYAKUMAR, *supra* note 296, at cols. 471-73.

303. JAYAKUMAR, *supra* note 296, at col. 526.

304. JAYAKUMAR, *supra* note 296, at col. 524.

305. S. Jayakumar, *Constitutional Limitations on Legislative Power in Malaysia*, 9 MALAY. L. R. 96, 117 (1967).

1215, which is to say, the Middle Ages”<sup>306</sup> – a law dating back beyond the colonial to the imperial era!

The constitutionality of these amendments was challenged in *Teo Soh Lung v. Minister of Home Affairs*<sup>307</sup> for transgressing legislative power, contravening the constitution’s “basic structure,” intruding upon judicial power and thus contrary to the Rule of Law. Chua J, in affirming the subjective ISA test, offered an anaemic version of the Rule of Law as the rule which Parliament stipulates and as an expression of parliamentary supremacy! In a passage of judicial reasoning that represents the very height of formalistic thinking, he said:

The amendments touching on arts 11, 12 and 93 are only intended to ensure that the clear intent of Parliament is not disregarded. There is nothing in the amendments which is unrelated to the requirements of national security. A reaffirmation of principles laid down by the courts cannot be said to be objectionable as usurping judicial power or being contrary to the Rule of Law. There is no abrogation of judicial power. It is erroneous to contend that the Rule of Law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgement in applications for judicial review . . . Parliament has done no more than to enact the Rule of Law relating to the law applicable to judicial review . . . Legislation designed against subversion must necessarily include provisions to ensure the effectiveness of preventive detention . . . (emphasis added)<sup>308</sup>

Thus, taken to its logical conclusion, the mere anointing of a Special Powers law as relating to national security lifts all limits on legislative power to enact the most repressive laws. The Court has also rejected arguments that detention orders which breached the GCHQ grounds of review or were made *mala fides* were “purported” rather than “real” decisions which may be reviewed in *Teo* and *Vincent Cheng v. Minister for Home Affairs*.<sup>309</sup> This stands at odds with the more robust principles of administrative review recently developed by the Malaysian courts. In principle they recognise that unlike the supreme UK Parliament, the Malaysian Parliament cannot by express words preclude any person from going to court, which is an aspect of the constitutional right to personal liberty.<sup>310</sup> This is because “Malaysia has a written constitution the basic framework of which has been fashioned in language that upholds the Rule of Law,” with the

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306. *Medieval Singapore*, WALL ST. J., Feb. 15, 1989, at 14.

307. [1989] SING. L. R. 499 (H.C.).

308. [1989] SING. L. R. 499 (H.C.), 515A-C (1989).

309. [1990] 1 MALAY. L.J. 449.

310. MALAYSIA CONST. art. 5(1). Article 9(1) of the Singapore constitution is modeled after Malaysian constitution.

personal liberty and equality clause demonstrating “that ours is not a Government of mere humans but of laws.”<sup>311</sup> This is instructive as the Singapore constitution bears similar provisions to and finds its genesis in the Malaysian constitution. However, the Malaysian courts have also recognised that “special consideration” as a matter of “judicial policy” must be given to national security cases where the court as a matter of self-restraint declines to intervene, save perhaps on procedural grounds, akin to that in the current ISA Act.<sup>312</sup> Thus, while the Malaysian courts recognise they *can* review national security cases, they affirm that they *will not*. The Singapore courts consider that the 1989 amendments effectively preclude substantive review of ISA cases. Thus, as Jayasuriya notes, this illiberal reading of the constitution has effectively “normalized in a juridical fashion” the “regime of exception,” occluding the line between exceptional regimes and normal legal processes and justifying the concentration of power in the executive.<sup>313</sup>

In defence, it is argued that there exist other safeguards against abuse.<sup>314</sup> Aside from the Advisory Board which conducts private proceedings but lacks binding powers, the EP under Article 21(2)(g) may withhold concurrence to a detention order or renewal. However, the EP is not an across-the-board independent check as his veto power only operates where the Cabinet disagrees with the Advisory Board’s recommendation of release.<sup>315</sup> This cannot be a substitute for judicial review in terms of protection. The marginalisation of the judicial role in these respects and the establishment of substitute non-legal checks in the form of elected bodies like the EP or an unelected council of advisors, while recognising the need to check concentrated power, does not sufficiently rein it in. It instead promotes a regime of *de facto* executive supremacy and the exercise of powers independent of formal legal control.

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311. Gopal Sri Ram JCA, *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Saah*, [1998] 3 MALAY. L.J. 289, 305A-D.

312. *Id.* at 309B-D.

313. Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 1 ASIAN-PAC. L. & POL’Y J.108, 110 & 114 (2001).

314. Associate Professor Ho Peng Kee, 71 SING. PARL. REP., Nov. 24, 1999 at col. 594.

315. Art. 151(4).



## V. JUDICIAL REVIEW, COMMUNITARIAN VALUES AND THE RULE OF LAW

### A. THE ETHOS OF THE COMMON LAW: INDIVIDUAL LIBERTY AND AVOIDING THE AUSTERITY OF TABULATED LEGALISM

If all power has legal limits, the ultimate law or *grundnorm*<sup>316</sup> must be the Constitution which is theoretically anterior and hierarchically superior to all other laws. Lord Diplock noted that for Westminster model constitutions, where "the doctrine of the separation of powers between legislature and executive is replaced by the doctrine of the supremacy of the legislature," it is crucial that the judicial branch of government "should have the exclusive power to interpret all written law once it has been made and to declare the unwritten common law and rules of equity."<sup>317</sup>

The judiciary plays a pivotal role in safeguarding a constitutional bill of rights, protecting individual autonomy from unwarranted state incursions. None of the constitutional liberties enshrined in Part IV (Fundamental Liberties) of the Singapore Constitution are absolute, but are framed as a "constitutional bargain": rights are qualified by a list of exceptions serving the public good. The quality of individual protection will depend on the theory of the individual espoused by the judiciary, whether individual dignity is an intrinsic good or whether the individual is conceived in instrumental terms to benefit the collective.

The common law embodies a philosophy which respects the dignity and liberty of individuals.<sup>318</sup> As TRS Allan notes:

The Rule of Law, as a juristic principle, thus embodies the liberal and individualistic bias of the common law in favour of the citizen. It transcends the principle of legality by authorising and demanding, an attitude of independence and scepticism on the part of the judges in the face of claims of government power.<sup>319</sup>

To Lord Diplock, the common law transcended a "fixed set of rules," being rather a "distinctive mode of legal reasoning" or "attitude of mind" which sought to achieve "fair dealing" in state-citizen or citizen-citizen dealings.<sup>320</sup> It is this attitude of "fair dealing" that judges in jurisdictions importing the common

316. On the particular topic of the Singapore constitution, see Harding, *Parliament and the Grundnorm in Singapore*, 23 MALAY. L. REV. 351 (1981).

317. LORD DIPLOCK, *supra* note 90, at 18.

318. RUTTER, *supra* note 49, at 574.

319. TRS Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, 119 (1985).

320. LORD DIPLOCK, *supra* note 90, at 18.

law should carry in meeting the challenge of developing the unwritten law so as to “best serve the changing needs of . . . [a] rapidly developing country, which might diverge from English common law developments.”<sup>321</sup>

Indeed, the Privy Council in the 1981 case of *Ong Ah Chuan v. PP*,<sup>322</sup> in relation to the meaning of “law” in the Singapore context, considered that in Westminster constitutions which carried Chapters of Fundamental Liberties, the reference to “law” in sentences like “in accordance with law” or “equality before the law” bore a specific non-literalist meaning. It “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.”<sup>323</sup>

The Privy Council notably affirmed a pro-individual bias in interpreting bills of rights in commonwealth constitutions, thus giving Part IV “a generous interpretation, avoiding what has been called the “austerity of tabulated legalism,” suitable to give individuals the full measure” of fundamental liberties.<sup>324</sup> As such, their Lordships rejected a view of the meaning of “law” as being synonymous with an Act passed by Parliament, “however arbitrary or contrary to fundamental principles of natural justice.”<sup>325</sup> As such, a person could not be deprived of personal liberty under Article 9 so long as the depriving Act is one enacted following the correct procedural manner—“in accordance with law.” Law had to comport with constitutional principles of natural justice, though whether these principles are procedural or substantive is contested.<sup>326</sup>

## B. THE DEATH OF THE ENGLISH COMMON LAW IN SINGAPORE?

In the debates surrounding the 1989 ISA amendments, the Home Minister stressed that particularly in public law, local

321. *Id.* at 4.

322. [1981] 1 MALAY. L.J. 64.

323. [1981] 1 MALAY. L.J. 64, 71B-D. This was affirmed by BO Nwabueze when he observed in 1973 that all new Commonwealth nations had bills of rights, the basis of which “is of course the common law, of which. . .they are declaratory. . .The bills of rights created no rights de novo but declared and preserved already existing rights, which they extended against the legislature.” BENJAMIN NWABUEZE, *CONSTITUTIONALISM IN THE EMERGENT STATES* 39-42 (C. Hurst ed., 1973).

324. [1981] 1 MALAY. L.J. 64, 70C-E.

325. [1981] 1 MALAY. L.J. 63, 70F-H.

326. See generally Harding, *Natural Justice and the Constitution*, 23 MALAY. L. R. 226 (1981); Iyer, *Article 9(1) and “Fundamental Principles of Natural Justice” in the Constitution of Singapore* 23 MALAY. L. R. 213 (1981).

socio-economic and political conditions must shape how cases are decided. Similarly, Lee Kuan Yew proclaimed in 1990 that:

In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore. . .

The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual.<sup>327</sup>

This opened the door to construing fundamental rights in Singapore according to particularist cultural tents. This judicial approach complements the contemporary rejection by political leaders of “Western” or liberal values. These are perceived to be excessively adversarial and individualistic, resulting in an over-emphasis on individual rights against community concerns. The fact that the Chief Justice shared these views is evident from a 1995 address in which Western liberal thought was posited as being at odds with the fundamentals of the Singapore legal system which espoused tough criminal laws based on the deterrence principle: “Our heritage has emphasised the importance of an individual’s duty and the primacy of the interests of the community. On the other hand, less conservative beliefs have promoted the rights of individuals as being of greater importance.”<sup>328</sup>

This critique against liberal thought is also evident where the Attorney General castigated the Law Society and particularly the criminal bar for not rebutting the allegation by foreign media that laws and cases had neutralised procedural rules formerly giving “undue protection to the accused.” This attitude could only “reinforce the absurd thinking of libertarian academics and the Western liberal press that our criminal laws are harsh and the legal system so loaded against an accused that no accused can get a fair trial in Singapore.”<sup>329</sup> Thus, the Senior Minister, Attorney General and Chief Justice seem to be *ad idem* in considering that community or public interests should be privileged over individual interests, consonant with the “shared value” of “society above self.” This pro-communitarian bias augurs the *quietus est* of the common law insofar as its basic premise is that a society

327. LEE KUAN YEW, *supra* note 1, at 156.

328. *CJ Defends Tough Laws, Punishment in Legal System*, STRAITS TIMES (SING.), Nov. 5, 1995, at 1.

329. *Law Society Failed to Defend Legal System: AG*, STRAITS TIMES (SING.), Nov. 18, 1995, at 1. See also AG Chan Sek Keong, *Cultural Issues and Crime*, 12 S.AC. L. J. 1, 1-25 (2000) and *The Criminal Process – The Singapore Model*, 17 SING. L. REV. 431 (1996). For a contrary view, see Michael Hor, *Singapore’s Innovations to Due Process*, a paper presented at the International Society for the Reform of Criminal Law, Conference on Human Rights and the Administration of Criminal Justice (Dec. 2000, Johannesburg), <http://www.isrcl.org/Papers/Hor.pdf>.

placing paramount importance on an individual's freedom and dignity is "more desirable" than one where state interests were prioritised over individual interests.<sup>330</sup> After the high watermark case of *Chng Suan Tze* in 1989 where the Court of Appeal adopted a robust view of the Rule of Law in holding a detention order invalid, judgements in public law cases began to evidence the conscious articulation of an alternative model to ordering state and society based on "local" conditions.

### 1. *Cutting Off the Umbilical Cord*

In 1994, Singapore cut off ties with the Privy Council as its highest court of appeal, partly because its judges were no longer attuned to local conditions. The Court further paved the way towards developing an autochthonous public law in adopting a 1994 Practice Statement on Judicial Precedents,<sup>331</sup> which states that Privy Council decisions did not bind the Court of Appeal which would nevertheless depart from them sparingly, "bearing in mind the danger of retrospectivity disturbing contractual, proprietary and other legal rights":

We recognise the vital role that the doctrine of *stare decisis* plays in giving certainty to the law and predictability in its application to similar cases. However, we also recognize that the political, social and economic circumstances of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the fundamental values of Singapore society.<sup>332</sup>

However, there is a discernible dichotomised approach in that the English model for private commercial law continues to be applied to promote certainty and stability, whereas there was no compelling imperative to continue English public law approaches. The judicial task was thus to articulate a public law jurisprudence inspired by local values, which would entail according greater weight to collective interest and balancing them against constitutional individual rights guarantees, than would be the case in Western jurisdictions.

### 2. *Finding New Moorings and Erecting "Four Walls"?*

Public law cases in the 1990s evince a shift away from a pro-individual towards a pro-communitarian approach in constitutional adjudication, where presumptive weight is accorded com-

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330. RUTTER, *supra* note 49, at 585.

331. Practice Statement (Judicial Precedent issued July 11, 1994), 2 SING. L. R. 689 (1994).

332. *Id.*

munity or statist concerns.<sup>333</sup> In *PP v. Mazlan*<sup>334</sup> the Court of Appeal dismissed an argument that an accused had a privilege against self-incrimination or that failing to inform the accused of such right violated constitutional guarantees to criminal due process. In the absence of an express constitutional right, the Court was unwilling to deduce it from the right not to be deprived of personal liberty "save in accordance with the law" entrenched in Article 9(1) as part of the bundle of rights associated with "fundamental principles of natural justice," recognised by the Privy Council in *Ong Ah Chuan*. This would be an unjustified "adventurous extrapolation" according to the Court which was disinclined towards strengthening individual due process rights through developing supporting or subsidiary rights associated with a textual right.<sup>335</sup>

The desire to equate "law" with "law enacted in accordance with correct procedure" which the Privy Council had rejected in *Ong Ah Chuan* resurfaced in *Jabar v. PP*<sup>336</sup> which addressed the constitutionality of the "death row phenomena" and whether this constituted cruel and inhumane treatment. It was possible to adopt a purposive approach through the gateway *Ong Ah Chuan* provided, by requiring that a law that took away life comported with a substantive standard of fairness and justice. One might then find the "death row phenomena" contravened that standard, a derogation of Article 9<sup>337</sup> for which some redress must lie. However, the Court opted instead to read "law" as merely meaning the will of the legislature enacted in due form, refusing to develop the idea of law or to expand on the ambit of constitutionally guaranteed rights: "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."<sup>338</sup>

This reduces the Court's guardianship function to merely ascertaining the correct enactment of a derogating law, noxious content notwithstanding. In a conception of law shorn of ethical or moral content, an Act of Parliament prescribing death by stoning or crucifixion would be legally valid; the only extra legal

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333. See generally L.A. Thio, *An "i" for an "I": Singapore's Communitarian Model of Constitutional Adjudication* 27 H.K. L.J. 152 (1997); *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?* SING. J.LEG. STUD. 240 (1997).

334. [1993] 1 SING. L. R. 512.

335. For a critical commentary, see M. Hor, *The Privilege Against Self Incrimination and Fairness to the Accused*, SING. J.LEG. STUD. 35, 44 (1993).

336. [1995] 1 SING. L. R. 617.

337. "No person shall be deprived of his life or personal liberty save in accordance with law." SING. CONST. art. 9.

338. [1995] 1 SING. L. R. 617, 631B.

check on such laws would be government sensibility or popular political morality. However, just as positivism's shadow appeared to hold sway, in the unusual case of *Taw Cheng Kong v. PP*,<sup>339</sup> concerning the equal application of an anti-corruption law, Karthigesu JA affirmed the Privy Council's view of "law" in *Ong Ah Chuan* as consistent with fundamental principles of natural justice,<sup>340</sup> since every law is subject to the principle of constitutionality – the highest law.<sup>341</sup>

In a rare excursion into rights jurisprudence, Karthigesu JA discussed the social contract and the idea of reciprocal exchange, concluding this was an inappropriate basis for comprehending the nature of constitutional rights.<sup>342</sup> Rather, constitutional rights as part of supreme law are not "carrot and stick privileges" but "inalienable" rights. This seems to appreciate the importance of valuing the intrinsic worth of rights recipients, since the state cannot alienate "inalienable" rights.<sup>343</sup> This case was rare also in the successful argument that the relevant Act was unconstitutional, although it is probably aberrant in the larger scheme of cases which are literalist and utilitarian in purport.

In seeking to develop a jurisprudence suited to local conditions, the courts have also apparently ignored the guidance established by the Privy Council in the case of *Haw Tua Tau v. PP*<sup>344</sup> where the Privy Council sought to lay down some guidelines as to whether a particular act or provision violates "fundamental principles of natural justice." A broad approach was advocated towards construing these principles, with reference made to international and regional documents like the Universal Declaration on Human Rights and the European Convention on Human Rights as well as comparative constitutional practices, including those of civilian systems. This approach suggests that Universalist principles may be found in and confirmed by global practice. However, a latter day parochialism is evident in the case of *Colin Chan v. PP*<sup>345</sup> concerning the scope of religious freedom (Article 15). Certain Jehovah's Witnesses, members of a de-registered so-

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339. [1998] 1 SING. L. R. 943. The decision was later overturned by the Court of Appeal. [1998] 2 SING. L. R. 410.

340. [1998] 1 SING. L. R. 943, 955, para 24H-I.

341. [1998] 1 SING. L. R. 943, 965G-H.

342. [1998] 1 SING. L. R. 943, 964D-I - 965 A-I.

343. [1998] 1 SING. L. R. 943, 965D-E.

344. [1981] 1 MALAY. L.J. 49.

345. [1994] 3 SING. L. R. 662. For a critical analysis of *Chan*, see L.A. Thio, *The Secular Trumps the Sacred: Constitutional Issues Arising out of Colin Chan v PP*, 16 SING.L.REV. 26, 26-103 (1995), reproduced in THE INTERNATIONAL LIBRARY OF SOCIAL CHANGE IN ASIA PACIFIC: SINGAPORE 135 (G. Rodan ed., 2001).

ciety,<sup>346</sup> challenged the constitutionality of prohibition order 123 issued under the Undesirable Publications Act (Cap 358) which made it an offence to possess Watchtower publications.

In terms of constitutional interpretation, Yong CJ adopted the "four walls" approach advocated in the Malaysian case of *Government of the State of Kelantan v. Government of the Federation of Malaya* where it was stated that: "[T]he 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."<sup>347</sup>

This parochial mindset was dismissive towards the range of standards cited from various international, regional and comparative sources as well as possible violations of international human rights standards. Yong CJ rejected as irrelevant US cases because the two countries had different "social conditions," but he did not elaborate.<sup>348</sup> He also ignored references to alleged violations of international declaration of human rights stating that "I think the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone."<sup>349</sup>

### 3. *A Jurisprudence Based on Local Conditions: What stuff "it is made of, whereof it is born"*<sup>350</sup>

In developing a "local conditions" public law jurisprudence, it behoves the judiciary to undertake a clear exposition of these "local conditions," to indicate which values are prioritised or discounted so that the nature of an emergent Singapore public law is made apparent. It implicates whether a presumptive weight ought to accorded individual rights, given that Singapore did adopt a bill of rights addressed to individuals, despite past duty-oriented Confucian traditions, and how this might translate within a community-oriented culture.

The cases reveal the prioritisation of certain values, including the paramount need to protect the reputations of public institutions and officials, evident in contempt of court and political

346. The Jehovah's Witnesses had been de-registered as a society under the Societies Act (Cap 311) in 1972 for opposing the government policy of compulsory military service.

347. [1963] MALAY. L.J. 355, 681A.

348. [1994] 3 SING. L. R. 662, 681E0H. This cursory invocation of local conditions was also apparent in *AG v Wain* when Sinathuray noted: "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." [1991] 2 MALAY. L.J. 525, 531H.

349. [1994] 3 SING. L. R. 662, 682A.

350. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, Act I Scene 1 line 4.

libel cases, which are stipulated limitations to the scope of free speech (Article 14).

In the leading case of *AG v. Wain*,<sup>351</sup> the right to engage in political speech criticizing the judiciary was treated as secondary to the needs of the administration of justice, which included protecting judicial reputation. The balance struck by the common law with respect to the offence of “scandalising the court” was considered apt, despite the fact that this had been struck in a context where free speech was a residual common law liberty (in the UK), whereas free speech is constitutionally guaranteed in Singapore. In not reconsidering the balance, the judge rejected invitations to consider cases from other jurisdictions with written constitutions which had to deal with common law developed offences that curtailed constitutional rights, as in the Canadian case of *R v. Kopyto*.<sup>352</sup> *AG v. Wain* reformulated the test after taking into account the increased importance associated with elevating free speech from a common law residual liberty to a constitutionally guaranteed right, bearing in mind too the role it played in promoting free and fair debate in a democratic society. The Canadian court clearly identified various factors that needed evaluation: whether harm to the administration of justice as caused by the speech was reasonably foreseeable, the gravity of the harm and the speaker’s motive. This identifies and gives consideration to two competing interests—the right to free speech in a democratic society and the interest in protecting the administration of justice, both of which are public interest matters. In *Wain*, the test was pegged at a level which shows its predilection towards institutional interests—there was no need to show a “real risk” of prejudice to the justice system; it sufficed if the words had the “inherent tendency to interfere with the administration of justice.”<sup>353</sup> An “inherent tendency” is a tenuous link and this test totally discounts the importance of free speech even where it relates to discussing the operation of a primary constitutional organ.

The same reluctance to reconsider how the common law struck the balance between free speech and the libel of politicians is present in the leading political defamation case of *JB Jeyaretnam v. Lee Kuan Yew*.<sup>354</sup> Again, this discounts the importance of the constitutional right of free speech. The Court of Ap-

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351. [1991] 2 MALAY. L.J. 525.

352. [1987] 39 CCC (3d) 2.

353. [1991] 2 MALAY. L.J. 525, 533I.

354. [1992] 2 SING. L. R. 310. For a comment, see M. Hor, *The Freedom of Speech and Defamation*, Sing J.Legal Stud. 543 (1992).



peal rejected the judicial approaches of the United States<sup>355</sup> and European Court of Human Rights<sup>356</sup> which applied a more liberal approach towards protecting speech, particularly where it concerned a politician, on the ground that open political debate is considered essential to a democratic society and people have a legitimate interest in how their public officials act. In rejecting the idea that greater latitude ought to be accorded critical speech directed against politicians because they were “public figures,” a passage from *Gatley on Libel and Slander* was approvingly quoted: “[S]o wide a privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for their reputation.”<sup>357</sup>

Thus, public officials as “sensitive and honourable men” are not expected to be thicker-skinned so as to attract a lesser degree of protection than a private individual. In *Goh Chok Tong v. JB Jeyaretnam*<sup>358</sup> the US approach was distinguished, as politicians did not have to show “actual malice” to prove defamation and the PM was entitled to his reputation “no less than the ordinary citizen.”<sup>359</sup> While acknowledging the “undeniable public interest” in protecting free speech as a means of exposing wrongdoing or abuse of public office, the court observes that “there is an equal public interest in allowing those officials to execute their duties unfettered by false aspersions.”<sup>360</sup> The importance of the intangible qualities of good character, integrity and honesty was stressed and thus, the plaintiff’s high standing could be a factor in raising the quantum of damages awarded.<sup>361</sup>

The focus on preserving public character downplays the individual’s right to free speech and the community’s interest in robust debate within a democratic society regarding public officials as an aspect of accountable, transparent government. This, coupled with the high libel damages awarded, e.g., Prime Minister Goh Chok Tong was awarded SGD 700,000 for libel in *Tang Li-*

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355. *New York Times v. Sullivan*, 376 US 254 (1964) (The Court of Appeal rejected the “actual malice” test.).

356. *Lingens v. Austria*, (1986) 8 EHRR 407. (The Court of Appeal rejected the idea that the acceptable limits of criticism were wider for politicians than private citizens.).

357. [1992] 2 SING. L. R. 310,333H-I.

358. [1998] 1 SING. L. R. 547.

359. [1998] 1 SING. L. R. 547, 561 F-H

360. [1998] 1 SING. L. R. 547, 561G-H.

361. [1998] 1 SING. L. R. 547, 592D-H.

*ang Hong v. Lee Kuan Yew*,<sup>362</sup> encourages self-censorship and “chills” speech. The cases tend to promote the community’s interest in ensuring respect for institutions and officials rather than its interests in holding public officials accountable.

Perhaps the most protected value in the case law is that of maintaining public order, broadly defined in Singapore to include protection against non-violent threats. For example, Yong CJ in *Colin Chan v. PP*<sup>363</sup> noted that relevant government ministers considered the continued existence of the Jehovah’s Witnesses (JWs) as prejudicial to national interests since they opposed national service. Banning the sect and its publications prima facie violated speech and religious freedom rights, although religious freedom is qualified by Article 15(4) that prohibits any act “contrary to any general law relating to public order, public health or morality.” Rejecting arguments that the JWs were non-violent, Yong CJ stated that their pacifist stance threatened to undermine government authority in the name of religious conviction. Hence, they were not merely conscientious objectors; their very act of objecting was deemed prejudicial to national interests and hence their rights were restricted so as to preserve “public order.” Yong CJ also seemed to approve a jurisprudence of pre-emptive strikes in rejecting the argument that a clear and present danger to order was needed before the propagation of religious beliefs could be halted. Like one acquainted with the woes of bureaucracy, he said: “In my opinion, 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.”<sup>364</sup>

Yong CJ further cemented the primacy of public order by declaring that while constitutional liberties like religious beliefs ought to have “proper protection,” actions pursuant to them must “conform with the general law relating to public order and social protection.” He declared: “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.”<sup>365</sup>

Applying this logic, Yong CJ noted that JWs’ religious beliefs against military service had to be subsumed under the gov-

362. [1998] 1 SING. L. R. 97. Opposition politicians have sued each other and in one instance, compensatory damages of SGD 120,000 have been awarded. See *Chiam See Tong v. Ling How Doong* [1997] 1 SING. L. R. 97.

363. [1994] 3 SING. L. R. 662, 688E-G.

364. [1994] 3 SING. L. R. 682, 683C-D.

365. [1994] 3 SING. L. R. 662, 684F-G.

ernment policy on compulsory national service. He declared that the latter is a "fundamental tenet in Singapore. Anything which detracts from this should not and cannot be upheld."<sup>366</sup> This ascribed a fundamental status to a mere law, exalting duty to the country over a right. Yong CJ was moved to take note of a government official's argument that recognising JW beliefs meant that "persons who enjoy the social and economic benefits of Singapore citizenship and permanent residence are excused from the responsibility of defending the very social and political institutions and structure which enables them to do so."<sup>367</sup>

This overriding concern for public order broadly conceived does not stem from any cultural tradition but rather is a statist concern with order over rights. Interestingly, in constructing a "four walls" approach towards interpretation, the judiciary is not averse to citing foreign cases, even Western cases, whenever they were deemed suitable to local conditions. In *JB Jeyaretnam v. Lee Kuan Yew*, the Court of Appeal cited and followed two Canadian cases, *Campbell v. Spottiswoode* (1863) QB 185 and *Tucker v Douglas* (1950) 2 DLR 827, which stressed the importance of maintaining the public character of institutions. The favourable citing of Canadian cases bears resonance with a remark by PM Goh that "[w]e are quite comfortable with the values of an earlier period of Western society."<sup>368</sup>

However, it is not merely Western cases of a more conservative era that Singapore Courts are comfortable citing. In *Colin Chan v. PP*, Yong CJ approved the 1943 Australian case of *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth*,<sup>369</sup> in which the Governor under emergency wartime regulations had seized the premises of a JW group, declaring their pacifism prejudicial to the Commonwealth's defence.<sup>370</sup> The importation of wartime cases, forged in a crucible unresponsive of strong legal curbs on executive power, into peacetime Singapore demonstrates the kind of "siege" mentality that makes law the servant to maintaining public order, undercutting a strong rights culture or muscular means of government accountability. As HRW Wade observed of administrative law during the war: "[T]he subject relapsed into an impotent condition, marked by neglect of

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366. [1994] 3 SING. L. R. 662, 678B.

367. [1994] 3 SING. L. R. 662, 684I. Of course, this goes against Karthigesu JA's view in *Taw Cheng Kong v. PP* that constitutional rights were inalienable rather than being a reciprocal exchange between government and citizen. [1998] 1 SING. L. R. 943, 965A-D.

368. *Be Fair, Be Truthful, Be Part of a Virtuous Cycle*, ST. PAITS TIMES (SING.), July 16, 1995, SR4.

369. (1943) 67 CLR 116.

370. [1994] 3 SING. L. R. 662, 683E-I.

principles and literal verbal interpretation of the blank cheque powers which Parliament showered upon Ministers. The leading cases made a dreary catalogue of abdication and error."<sup>371</sup>

## VI. CONCLUSION

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. Its operation is dictated by the imperative of efficiency and stability rather than by concerns of social justice which a "thicker" conception might encompass. The Rule of Law as understood by Singapore's leaders is not the version based upon the liberal democratic model, but is driven by the prioritisation of statist goals like stability and economic growth and directed by the authoritarian hand of an efficient and relatively incorrupt government. It is more accurately characterised as the rule of "rules" or the rule *by* law. Law does not chain the Leviathan state although it does keep the miseries of the Hobbesian state of nature at bay. Much, however, is subject to the imperative of order, buttressed by the revival of Neo-Confucianist cultural arguments that serve as a foundational idea around which politics, economics and society revolve, with "law" being a minor player in this universe.

While a constitutional government is formally based on a division of powers, centralised power is effectively wielded by the parliamentary executive in the context of a managed democracy with an undeveloped rights culture. Although there exist the formal institutions and processes promoting democratic pluralism and for challenging state action, they are weak.

In the realm of private commercial law, the efficiency of the judicial framework, the legal certainty and procedural fairness it provides, buttresses Singapore's project to be an international trade and financial center. Where public law issues are concerned, the judicial "communitarian" approach consolidates state stability and social order in utilitarian terms, with lesser attention given to civil liberties and dignitarian concerns. Rather than being a robust principle of civilised governance, the Rule of Law is handmaiden to economic development, strengthening state institutions rather than protecting individual rights. A certain degree of cross-purposes is evident in dialogue concerning the Singapore legal system. In a reply to a report by a UN Special Rapporteur (extrajudicial, summary or arbitrary executions) concerning com-

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371. ADMINISTRATIVE LAW, 19 (4th ed., 1977).

munications directed to Singapore alleging certain human rights violations which carried “insinuations of possible wrongdoings by our judiciary,” the Singapore Permanent Representative responded by citing the World Competitiveness Yearbook 2001’s ranking of Singapore among the top fifteen countries in terms of fairness of administration of justice.<sup>372</sup> Whether this allegation is justified or not, the reply fails to address the expressed concern, as the methodology of the World Competitiveness Report aims to ascertain “how national environments are conducive or detrimental to the domestic and global competitiveness of enterprises” in a country. None of the principles relate directly to human rights-related policies.<sup>373</sup> This illustrates on a domestic level the inability of formalist proponents of the “thin” Rule of Law to appreciate the broader range of claims made pursuant to a “thicker” version.

Both the Attorney General<sup>374</sup> and the Chief Justice<sup>375</sup> have approvingly cited the Latin maxim *Salus Populi Suprema Lex*, or, the people’s safety is the supreme Law. While necessary for order, this is insufficient if a fair, just and humane order is the end. While the constitution and rights were marginalised in the push for economic take-over, in contemporary Singapore society where basic needs have been satisfied, there are being articulated greater demands for intangible goods like a liberal constitution, limited government, greater consultation and better protection for a citizen’s liberty and security. As the Singapore polity gradually matures, it may be necessary to infuse a wider vocabulary of justice into the Rule of Law idea, if the legal system is to sustain the support of the citizens whose lives it orders, and to solidify its claims to legitimacy.

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372. U.N. Doc. E/CN4/2002/74; Letter from Permanent Representative of Singapore to the UN addressed to the Chairperson, (Commission on Human Rights, 58th Sess.,) U.N. Doc. E/CN4/2002/170 (Apr. 3, 2002)(appending a letter sent to the Special Rapporteur).

373. World Competitiveness Report (1993) at 30-31. Principles include whether trade is internationalized, how much the state intervenes in business activities, whether social conditions are predictable, the quality of infrastructure, whether the labor force is skilled and whether competitiveness leads to increased expectations concerning the quality of life.

374. *Law Society Failed to Defend Legal System: A-G*, STRAITS TIMES (SING.), Nov. 18, 1995, at 1.

375. *Colin Chan v. PP* [1994] 3 SING. L. R. 662, 678G-H.