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Review - Others
Constitution woes

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Evolution Of A Revolution: 40 Years Of The Singapore Constitution. Edited by Thio Li-ann & Kevin Tan. Routledge-Curzon, 2009 (369 pages)

DAVID Marshall wrote a letter to this newspaper in 1965, bemoaning Singapore's Constitution as 'the untidiest and most confusing' any country could have started life with. He predicted 'a rich harvest of headaches for lawyers and judges'.

For the sake of stability and gradual change, the 1958 State Constitution, beefed up with specific provisions from Malaysia's Federal Constitution, was adopted as independent Singapore's Constitution when it separated from Malaysia in 1965. Since then, the Constitution, which declares in Article 4 that it is the supreme law in Singapore, has been so thoroughly amended that gradual changes have amounted to a revolution - as Evolution Of A Revolution argues.

A collection of essays by seven National University of Singapore law academics, edited by Drs Thio Li-ann and Kevin Tan, the book seems to conclude that the judges have found a cure for those headaches in a formalist approach, one concerned not so much with substance as with procedure.

The authors collectively seem to agree that the judiciary's formalist approach and its deference to Parliament in constitutional interpretation have transformed the Constitution into a set of rules the Government can interpret and amend at will. For this government, Dr Thio argues, public order is supreme. Thus it interprets the Constitution in ways it deems will best ensure that public order which makes possible the pursuit of 'happiness, prosperity and progress'.

For the authors, this fact of life seems to evoke much angst perhaps because legal theory takes as a truism that 'Constitutions exist to order and organise (and limit) the exercise of governmental power'. For example, Professor Michael Hor believes 'observance of the 'Fundamental Liberties'...ought to be the norm'. The Government could reply that it has no desire to import pernicious liberal ideas and perilous 'rights talk' cooked up in societies markedly different from us. Dr Arun Thiruvengadam, in his contribution, notes that, since 1989, the courts have consistently deferred to Parliament's constitutional interpretations.

Calling this a nationalist, formalist approach, he notes that in *Chng Suan Tze v MHA* (1988), then-chief justice Wee Chong Jin, citing decisions from Zimbabwe, Namibia and the Privy Council, had ruled: 'All power has legal limits and the rule of law demands that the court should be able to examine the exercise of discretionary power' in detaining citizens without trial under the Internal Security Act. He regards this as the high watermark of local constitutional jurisprudence. But Parliament emphatically rejected the decision as judicial 'misadventure' and amended Article 149 (3) so that henceforth, as Prof Hor puts it, 'the Constitution is not supreme, Parliament is'.

Thus Singapore has chosen public order over individual rights. Yet, the final paragraphs of perhaps every chapter express the pious hope for some evolution towards a constitutional jurisprudence that will be more willing to consider foreign liberal experiences and thus, one more protective of individual rights.

Dr Thio suggests that respect for human rights is part of the public order that Parliament champions. But Parliament is a blunt tool that 'resolves disputes by reference to majority will, not rights', she notes. Better a judiciary that will 'shift from rules-based to rights-based conception of law', she urges. Assuming this is what the people want - an eminently contestable fact - what would be the transmission belt to move judges from the current paradigm to its exact opposite?

Dr Tan Seow Hon offers a cogent if idealistic possibility. Our embrace of a written, supreme Constitution, she avers, implies that we agree that the law is not the law just because a court says it is but because it conforms to Reason. A Constitution is legitimate because it was adopted by an assembly approved by the people. But that consent matters only because people are co-equal citizens. And we grasp that co-equality only because Reason teaches us that everyone has equal dignity and worth by virtue of being human, regardless of colour, creed, gender or any other accident of birth.

Thus our very embrace of a written Constitution implies our acceptance of this picture of Man as a being governed above all by Reason. If so, our Constitution is really founded on Reason, a law higher than the law. This fact might impel the judiciary, Dr Tan avers, towards a jurisprudence that respects our rights more. The hope seems to be that judges will don the hats of legal philosophers when it comes to constitutional matters. Possible but improbable, I think.

Professors Jaclyn Neo and Yvonne Lee note the mushrooming of quasi-constitutional principles in White Papers, which the Cabinet issues and Parliament adopts. These principles are accepted as being as fundamental as those to be found in constitutional preambles. Dr Kevin Tan offers a historical survey of how constitutional institutions have been constructed and remodelled since 1965.

If the judges have a cure for their Marshallian headaches, this book is proof that legal scholars don't - yet.

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