PARLIAMENT AND THE GRUNDNORM IN SINGAPORE

I wish in this article to deal with some difficult questions of constitutional theory in relation to the evolution of Singapore's constitution. I hope also in the process to present an exegesis of Singapore's constitutional history which will provide a basis for further consideration of constitutional matters of a more practical kind. I do not advance so far as to consider institutions as such, or to consider the future development of the Constitution. I believe, however, that after eighteen years of stability under a democratic system of government, it is now necessary for Singaporeans to examine their institutions carefully, especially as the Republic, after progressing from precarious survival to economic success, will soon be entering a new phase in her history under new leaders. The Constitution is one of these institutions, prescribing as it does a democratic, cabinet-style system of government, on the Westminster model, with safeguards in the form of guarantees of the observance of fundamental liberties, special protection for the rights of minorities, and measures to secure the independence of the judiciary and the civil service. Before the Constitution can be meaningfully discussed, it is necessary to consider the nature and evolution of the Constitution itself. Most of what is written here may seem to belong to the realm of high theory, but my intention is to provide a theory of Singapore's Constitution which is both accurate and appropriate, and which also explains the Constitution in terms of autochthony. Were a new Constitution in the offing, it might have been unnecessary to embark upon this line of inquiry, but with the publication of a Reprint of the Constitution in 1980, and the restoration of the two-thirds majority requirement for a constitutional amendment in 1979, it would appear that the present Constitution is regarded as adequate and will remain operative for many years to come.[1] It is therefore pertinent to inquire into some fundamental questions concerning the Constitution, especially when, if the views here advanced are correct, the fundamental proposition concerning the Constitution, *viz.*, that the Constitution is supreme law, is misconceived.

It is commonly assumed that in Singapore the Constitution is the supreme law and that Parliament, unlike its British namesake but like the United States Congress, can only enact legislation which is consistent with the Constitution; legislation which is inconsistent with the Constitution is liable to be struck down by the courts. This view is held, so far as I know, universally. For example Professor Jayakumar asserted in 1976 that "[t]he Constitution embodies the concept of supremacy of the Constitution,"[2] though he conceded that the supremacy concept was somewhat blurred by the power of the legislature to

[1] See S. Jayakumar, "The Constitution (Amendment) Act 1979", (1979) 21 Mal. L.R. 111, 117.

[2] S. Jayakumar, Constitutional Law, S.L.S. No. 1, p. 1.

amend the Constitution by passing a law.[2] The Privy Council too has asserted the power of judicial review of legislation in recent cases[4] on the assumption that the Constitution is supreme law. The Constitution itself is party to this conventional view when it says at Article 4:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

I intend to show later that this provision does not in fact import constitutional supremacy.

I wish to show that the view that the Constitution is supreme in Singapore is false and involves a misinterpretation of the origins of the Constitution. I will argue that the history of Singapore's Constitution is unique because of the constitutional facts of the merger with, and the separation from, Malaysia, and that it can be explained only in terms of legislative supremacy. This conclusion might at first blush seem shocking, but in fact Singapore's unique constitutional history has never been systematically treated and the notion that the Constitution is supreme rests on no articulated theory but only upon assumption.

I will first set out the relevant facts. 1 will then discuss the possible interpretations of these facts and attempt to show that legislative supremacy is the only theory which is tenable on the basis of those facts.

1. MERGER, SEPARATION AND THE NEW STATE

As a crown colony, Singapore was subject to the sway of the United Kingdom Parliament. That body was sovereign and supreme in Singapore as in all other Crown colonies. Following the Second World War the restoration of British rule was not intended to be permanent and eventually the Federation of Malaya came into being on 31st August 1957 under a new democratic and federal Constitution,[5] while Singapore was given a fully democratic Constitution and internal self-government in 1959.[6] However the new People's Action Party government, elected under that Constitution, saw Singapore's fate as linked with that of the Federation, and under the Malaysia Agreement 1963 [7] it agreed to join in the new Federation of Malaysia, together with Sabah and Sarawak. Merger was effected as from 16th September 1963 by the (federal) Malaysia Act 1963.[8] Singapore was given a new

[3] See Art. 90 of the Constitution of Singapore, now Art. 5 of the 1980 Reprint. Since the Constitution (Amendment) Act 1979, a two-thirds majority at second and third readings is required before an amendment bill can be passed. For comment on this Act, see S. Jayakumar, *op. cit*., R.H. Hickling "Reprint of the Constitution of the Republic of Singapore" (1980) 22 Mal. L.R. 142, and the author's "The 1980 Reprint of the Constitution of the Republic of Singapore, Old Wine in a New Bottle?", (1983) 25 Mal. L.R. 112.

[4] *Ong Ah Chuan* v. *P.P.* [1981] 1 M.L.J. 64, *Haw Tua Tau* v. *P.P.* [1981] 2 M.L.J. 49.

[5] See the Federation of Malaya Agreement 1957 and the Federation of Malaya Independence Order in Council S.I. 1533 (1957) (U.K.).

[6] See the Singapore (Constitution) Order in Council S.I. 1956 (1958) (U.K.).

[7] U.K. Cmnd. 2094 (1963).

[8] Federal Act 26 of 1963.

State Constitution (hereafter "the 1963 Constitution") by Order in Council,[9] made under the (U.K.) Malaysia Act 1963.[10] Under that Act Her Majesty's sovereignty and jurisdiction in respect of Singapore was relinquished. It is the 1963 Constitution which lies at the heart of the Constitution of the Republic of Singapore as reprinted in 1980 under the Constitution (Amendment) Act 1979.[11] It was however conceived as the Constitution of a state of a new federation and its disposition of legislative and executive power was, both in its own terms and those of the Federal Constitution, subject to the Federal Constitution.

However, this arrangement, so eagerly sought, was short-lived, and on 7th August 1965 the Governments of Malaysia and Singapore entered into an agreement that Singapore should become an independent and sovereign state.[12] On 9th August the respective Prime Ministers proclaimed the independence of Singapore.[13] The Prime Minister of Singapore, Mr. Lee Kuan Yew, proclaimed.

> on behalf of the people and the Government of Singapore that as from today the ninth day of August in the year one thousand nine hundred and sixty five Singapore shall be forever a sovereign, democratic and independent nation, founded upon the principles of liberty and justice and ever seeking the welfare and happiness of her people in a more just and equal society.

Separation was effected constitutionally by the (federal) Constitution and Malaysia (Singapore Amendment) Act 1965,[14] (hereafter "the Singapore Amendment"). This Act also made provision for constitutional matters in Singapore in the following manner:

> 3. Singapore shall cease to be a State of Malaysia on the 9th day of August, 1965 (hereinafter called "Singapore Day") and shall thereupon become an independent and sovereign state and nation separate from and independent of Malaysia; and accordingly the Constitution of Malaysia and the Malaysia Act shall thereupon cease to have effect in Singapore except as hereinafter provided.
>
> 4. The Government of Singapore shall on and after Singapore Day retain its executive authority and legislative powers to make laws with respect to those matters provided for in the Constitution.
>
> 5. The executive authority and legislative powers of the Parliament of Malaysia to make laws for any of its Constituent States with respect to any of the matters enumerated in the Constitution

9 See the Sabah, Sarawak and Singapore (State Constitutions) Order in Council S.I. 1493 (1963) (U.K.).

10 c. 35.

11 Act 10 of 1979.

12 Independence of Singapore Agreement, Singapore Government Gazatte Extraordinary, 9th August 1965, Vol. VII, No. 66. Interestingly, Professor Green considers that this agreement is not an international, but merely an "inter-ministerial" agreement, and notes that it was signed neither by the Yang di-Pertuan Negara of Singapore nor by the Yang di-Pertuan Agong of Malaysia. For a full discussion of the international law position with regard to the separation see L.C. Green, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity," Canadian Yearbook of International Law 1966, 3 and esp. pp. 34 *et seq.*

13 See note 11.

14 Act 53 of 1965.

shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Government of Singapore.

6. The Yang di-Pertuan Agong shall on Singapore Day cease to be the Supreme Head of Singapore and his sovereignty and jurisdiction, and power and authority executive or otherwise in respect of Singapore shall be relinquished and shall vest in the Yang di-Pertuan Negara, the Head of State of Singapore.

7. All present laws in force in Singapore immediately before Singapore Day shall continue to have effect according to their tenor and shall be construed as if this Act had not been passed in respect of Singapore subject however to amendment or repeal by the Legislature of Singapore.

Thus Singapore became a fully independent sovereign state for the first time. Government proceeded, apparently as normal, from 9th August 1965. The Legislative Assembly set up under the 1963 Constitution began its first session since separation on 8th December 1965. During this first session it passed two measures of constitutional importance, the Constitution (Amendment) Act 1965,[15] and the Republic of Singapore Independence Act 1965,[16] (hereafter "the R.S.I.A.").

The Constitution (Amendment) Act 1965 was "enacted by the Yang di-Pertuan Negara with the advice and consent of the Legislative Assembly" and was deemed to have come into operation on 9th August 1965. This Act changed the titles of "Yang di-Pertuan Negara" to "President", and "Legislative Assembly" to "Parliament". In addition to various amendments to the 1963 Constitution, the amendment provision itself was amended so as to remove the requirement for a two-thirds parliamentary majority to effect a constitutional amendment. Henceforth, the Constitution could be amended simply by a law enacted by the legislature.[17]

With its next breath, the legislature (now described as "the President with the advice and consent of Parliament") proceeded to pass the R.S.I.A. This too was retrospective to 9th August 1965 and provided for constitutional matters as follows:

3. The Yang di-Pertuan Agong of Malaysia shall with effect from Singapore Day cease to be the Supreme Head of Singapore and his sovereignty and jurisdiction and power and authority, executive or otherwise, in respect of Singapore shall be relinquished and shall vest in the Head of State.

4. The executive authority of Singapore shall, on and after Singapore Day, be vested in the Head of State and shall be exercisable by him or by the Cabinet or by any Minister authorised by the Cabinet.

5. The legislative powers of the Yang di-Pertuan Agong and the Parliament of Malaysia shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Head of State and in the Legislature of Singapore, respectively.

[15] Act 8 of 1965.
[16] Act 9 of 1965.
[17] See note 2.

6. (1) The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysian.

(2) The provisions of the Constitution of Malaysia referred to in subsection (1) may in their application to Singapore to be amended by the Legislature.

(3) The following provisions of the Constitution of Malaysia shall cease to have effect in Singapore: —

Part I; Article 13; Articles 14 to 18; Article 19A; Article 22; Articles 28 and 28A; Articles 30, 30A and 30B; Part IV; Part V; Part VI; Part VII; Articles 133 and 134; Article 139; Articles 141 to 143; Articles 146A to 148; Part XII; Part XIII; Part XIV; The Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteenth Schedules....

13. — (1) Subject to the provisions of this section, all existing laws shall continue in force on and after Singapore Day, but all such laws shall be construed as from Singapore Day with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act and with the independent status of Singapore upon separation from Malaysia....

(7) In this section —

"existing law" means any law including written law having effect as part of the law of Singapore prior to Singapore Day; and

"written law" includes the Constitution of Malaysia and the Constitution of Singapore and all Acts, Ordinances and enactments by whatever name called and subsidiary legislation made thereunder for the time being in force in Singapore."

Such, in brief, are the legislative facts relating to merger, separation and the founding of the new Republic.

It will be seen that at that stage the constitutional law of Singapore was contained in three documents:

(i) the R.S.I.A.,

(ii) the 1963 Constitution, as amended, and

(iii) the Federal Constitution insofaras it was applied to Singapore by the R.S.I.A. (hereinafter "the Malaysian provisions").

The latter two documents, together with all amendments effected under Article 90 of the 1963 Constitution and section 6(2) of the R.S.I.A., and certain modifications effected by the President under section 13(3) of the R.S.I.A., and by the Attorney-General under section 8 of the Constitution (Amendment) Act 1979,[18] have been consolidated in a Reprint (hereafter "the Reprint") dated 31st March 1980 and prepared by the Attorney-General pursuant to the Constitution (Amendment) Act 1979.

[18] Act 10 of 1979.

2. CONSTITUTIONAL SUPREMACY

Having set out the historical and legislative facts relevant to the process of Singapore's independence and constitutional development, I wish to consider some of the arguments which can be said to support the view that the present Constitution, as reprinted in 1980, is the supreme law of Singapore.

It is perhaps important to state at this point what is meant in this article by "constitutional supremacy", and "legislative supremacy." By the former I mean that the legislative power of Parliament is restricted, procedurally and substantively, by the terms of a written document (in the case of Singapore, the Reprint), in the sense that any legislation duly passed by Parliament and assented to by the President will be law if, and only if, it is consistent with that document and is passed in accordance with the terms thereof; otherwise it will be struck down by the courts as being unconstitutional. By the latter I mean that the legislative power of Parliament is unrestricted by any prior legislative instrument and the courts have no power to determine the constitutionality of any legislation enacted by Parliament. It should be noted that the concept of "legislative supremacy" as here defined does not answer the question whether Parliament is bound by a prior statute which either defines the legislature for a given purpose or defines what is an act of the legislature for a given purpose; I am adverting here to the well-known distinction between the "continuing" and "self-embracing" theories of parliamentary supremacy. I prefer to use the term "legislative supremacy" in relation to Singapore because the legislature is defined by Article 38 of the Reprint as consisting of the President and Parliament, so that to speak of parliamentary supremacy is semantically incorrect.

The theory that in Singapore the Constitution is supreme law has never in fact been set out, and I am under the handicap of having to refute a theory which has only ever been assumed. I shall therefore attempt to put what seem to me the best arguments for that theory and examine them in a critical light.

Let us take first of all the wording of Article 4 of the Reprint. This might seem at first sight to be conclusive, but a moment's reflection will show that it is not. A legislative instrument does not answer to the description it gives itself merely by giving itself that description, even though such a description might seem to be positive law, any more than I can become Napolean merely by declaring myself to be Napoleon.[19] Thus an instrument purporting to be an Act of Parliament is only such if it was in fact validly enacted by Parliament, and that is true both under a written Constitution and under a regime of parliamentary supremacy — even the "Parliamentary Roll" theory of constitutionality assumes this to be so.[20] Similarly an instrument cannot

[19] *Cf.* the remarks of Lord Diplock concerning the authority of the Yang di-Pertuan Agong of Malaysia to make emergency regulations under emergency ordinances when the power to make emergency ordinances had ceased due to the sitting of Parliament, *Teh Cheng Poh* v. *P.P.* [1979] 1 M.L.J. 50, 53. The substance of the argument there is that the Yang di-Pertuan Agong could not empower himself to continue to promulgate ordinances merely by calling them regulations, for "that would be tantamount to the Cabinet's lifting itself up by its own boot straps,'" *ibid.*, *p.* 53.

[20] For the English position see *British Railway Board* v. *Pickin* [1974] A.C. 765 and *Edinburgh and Dalkeith Railway Co.* **v.** *Wauchope* (1842) 8 Cl. & Fin. 710.

validate itself by declaring itself valid. It is *ab initio* either valid or invalid, because its validity will depend upon some higher legal authority. Constitutional instruments are in a special position because there is generally nothing that gives them validity except the grundnorm, (if one is Kelsenian) or ultimate rule of recognition (if one is Hartian), whatever it may be, which will be found only in the historical and legal circumstances surrounding the emergence of the Constitution. Thus the American, Indian and Malaysian Constitutions can be said to be supreme law in their respective legal systems by virtue of the circumstances in which they came about; supremacy can be asserted in terms of the grundnorm. On the other hand it is clear that within the English legal system an Act of Parliament which proclaimed itself supreme law could never be supreme law because of the prevailing doctrine of parliamentary supremacy; the grundnorm will not allow it.[21] It will be well also to notice something else. Article 52 of the 1963 Constitution said:

> Any law enacted by the legislature after the coming into operation of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

The words "this Constitution is the Supreme Law of the Republic of Singapore and …" were added by the Attorney-General for the purposes of the Reprint. Since Article 52 referred to the Constitution of a state of a federation, which is all the 1963 Constitution ever was or was intended to be, that provision is not evidence that that Constitution was supreme law; in fact of course the Federal Constitution was supreme law,[22] and any law enacted by the legislature of Singapore contrary to the Federal Constitution, even if expressed as an amendment of the 1963 Constitution, would be void. Article 52 merely provided a further restriction of the already restricted powers of the Legislative Assembly. Thus the supremacy clause, *qua* supremacy clause, has only been part of the text of the Constitution since 31st March 1980, when the Reprint became operative. The theory of constitutional supremacy therefore requires us to believe either that on 31st March 1980 the Constitution mysteriously became supreme law (this I submit is so incredible that it requires no further discussion — I doubt if the learned Attorney-General would wish to claim that by a mere stroke of the pen he had rendered the Constitution supreme law as from as from 31st March 1980,[23]) or that the present Article 4 merely states what was already so. Thus Article 4 adds nothing to the argument: it is either a correct or an incorrect description of the status of the Constitution. In view of the arguments put forward here and all the constitutional developments prior to 9th August 1965 the Constitution can only be supreme law if there was something about the constitutional facts of separation which made it supreme law.

A second argument which can be adduced for constitutional supremacy is that under the Constitution as reprinted, a two-thirds parliamentary majority at the second and third readings is required before an amendment to the Constitution can be effected.[24]

[21] The literature is voluminous, but for an interesting modern study of the problem see G. Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined," 92 L.Q.R. 591.
[22] Constitution of Malaysia, Art. 4(1).
[23] See the author's "The 1980 Reprint of the Constitution of the Republic of Singapore. Old Wine in a New Bottle?", (1983) 25 Mal. L.R. 112.
[24] 1980 Reprint, Art. 5 and see note 2.

It will be noted that this requirement was reintroduced by the Constitution (Amendment) Act 1979, having been removed by the Constitution (Amendment) Act 1965, and now, under the Reprint, purports to apply not just to the 1963 Constitution as amended, but to all the provisions of the Reprint, including the Malaysian provisions, which by section 6(2) of the R.S.I.A, were allowed to be amended by an ordinary law. The argument we are considering therefore entails the conclusion that whether the Constitution is supreme law depends on whether Parliament chooses to remove or reinstate the two-thirds majority requirement — on this view the Constitution was at no time supreme law in Singapore until the Constitution (Amendment) Act 1979 took effect on 4th May 1979, and might cease to be supreme law if Parliament thought fit to restore the position to that obtaining prior that date. If the Constitution is supreme it cannot be demoted by Parliament. If on the other hand it is not supreme it cannot be elevated by Parliament.[25] In both instances it is the law of Parliament which is supreme, not the Constitution. In constitutional supremacy, on the other hand, the constitution, not the legislature, governs the width of legislative power.

Moreover it can even be doubted whether the Attorney-General was in fact empowered under the Constitution (Amendment) Act 1979 to change the amendment procedure in respect of the Malaysian provisions.[26]

It will be opportune here to consider, in view of the doubt whether the two-thirds majority requirement applies to the Malaysian provisions, what is the precise status of these provisions. They were introduced by the R.S.I.A. and any of them could clearly have been repealed (and were in fact amended) with regard to Singapore at any time by an ordinary act as prescribed by Section 6(2) of the R.S.I.A. It is not an attribute of supreme law to owe its origins and continued existence to the will of a parliamentary majority, yet this is true of the Malaysian provisions. Furthermore it will be noted that they did not have the benefit of the supremacy clause in the Federal Constitution, which was specifically and deliberately excluded from the provisions continued in force in Singapore,[27] and it is in any case hard to see how the adoption of that clause by the R.S.I.A. would have made any difference.

I therefore conclude from the foregoing discussion that

i) with regard to the Malaysian provisions, they are not and have not since 9th August 1965 been supreme law in Singapore,

ii) with regard to the provisions of the 1963 Constitution, it remains to be proved that they are and have since 9th August 1965 been supreme law in Singapore, and

[25] This question continues to plague the British Constitution. See *A.G. for New South Wales* v. *Trethowan* [1932] A.C. 526 and *Manuel* v. *A.G.* [1982] All E.R. 786.

[26] See the author's arguments at (1983) 25 Mal. L.R. 114, *et seq*., to the effect that the Malaysian provisions, not having been subjected to the two-thirds majority requirement by the Constitution (Amendment) Act 1979, could not be so subjected by the Attorney-General in the Reprint.

[27] R.S.I.A., s.6(2).

iii) whatever the position with regard to these matters prior to the Constitution (Amendment) Act 1979 and the Reprint, it remains unaffected by these two events.

3. KELSEN, HART AND THE EMBRYONIC LEGAL SYSTEM

Without wishing to assume a Herculean role, 1 believe these arguments have the effect of clearing out the Augean stables. Unlike Hercules, however, it is incumbent upon me to fill them again. Hopefully however the contents of the stables will be pure and wholesome.

The enigma in this discussion is the R.S.I.A., and it seems to me that the solution of the problems discussed here is to ascertain the precise nature of this Act and its position in the Constitution. To do this I propose to step into an area where angels and the majority of constitutional lawyers fear to tread, namely that area of jurisprudential theory which is dominated by Hans Kelsen and Professor Hart, and seeks to find an ultimate principle which validates the legal system. It seems inevitable that, where were have an uncertainty relating to some aspect of the structure of a legal system — and I believe this is precisely the kind of problem we have here — the jurisprudential theorist will be called in to assist the constitutional lawyer. Like a lost sheep, I shall not question the credentials of my rescuer, though I am aware that many regard his credentials as questionable, and I am fortified in this by the fact that judges in Commonwealth countries have adopted a similar course when confronted with difficulties of this kind (though of infinitely greater political importance).[28] In short I propose to use the grundnorm theory of Hans Kelsen (or if you prefer, Professor Hart's ultimate rule of recognition) to explain the origins of Singapore's Constitution.

Kelsen attempted to explain the structure of a legal system in terms of a basic norm (grundnorm), from which all the other norms of the system derive their validity. This theory is of particular interest to constitutional lawyers, as the following passage from the *General Theory of Law and State* reveals:

> The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm. To the question why a certain act of coercion — e.g., the fact that one individual deprives another individual of his freedom by putting him in jail — is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is because it has been created in conformity with a criminal statute. This statute finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.
>
> If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that

[28] The literature is voluminous on this question. See especially S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", 7 U. Ont. L.R. 93 (1968), T.K.K. Iyer "Constitutional Law in Pakistan", Am. J. Comp. Law (1973) xxiil 14, fall, 759, J.M. Eekelaar "Splitting the Grundnorm" 30 M.L.R. 159 (1967), and the numerous references therein.

> is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have no such effect. All these legal norms belong to one and the same legal order because their validity can be traced back — directly or indirectly — to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order.[29]

The condition for the validity of a legal system on this model depends further on the principle of efficacy — the system must be efficacious in practice, or else it will lose its validity. Thus Kelsen envisaged that the grundnorm, in a revolutionary situation, can change, so that the old order ceases to have a claim to validity and is replaced by a new system with its own grundnorm. This system too, of course, must be efficacious:

> A revolution,... occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order.... No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order — to which no political reality any longer corresponds — has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms....
>
> It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order

[29] Hans Kelsen, *General Theory of Law and State,* Translated by Anders Wedberg, New York (1961), pp. 114-5.

> is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaires fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.[30]

In other words a successful revolution begets its own legality.

The question which this theory poses in relation to the events of 1965 in Singapore is whether we have a smooth (in terms of the grundnorm) transition from one Constitution to another, or whether we have a legal revolution. In terms of the constitutional history of Commonwealth countries, Professor Hart, who has developed a more sophisticated, but fundamentally similar, kind of analysis of legal systems to that of Kelsen, has given us an interesting model:

> The converse of the situation just described is to be seen in the fascinating moments of transition during which a new legal system emerges from the womb of an old one — sometimes only after a Caesarian operation. The recent history of the Commonwealth is an admirable field of study of this aspect of the embryology of legal systems. The schematic, simplified outline of this development is as follows. At the beginning of a period we may have a colony with a local legislature, judiciary, and executive. This constitutional structure has been set up by a statute of the United Kingdom Parliament, which retains full legal competence to legislate for the colony; this includes power to amend or repeal both the local laws and any of its own statutes, including those referring to the constitution of the colony. At this stage the legal system of the colony is plainly a subordinate part of a wider system characterized by the ultimate rule of recognition that what the Queen in Parliament enacts is law for (inter alia) the colony. At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a 'local root' in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed. Hence, though the composition, mode of enact-

[30] *Ibid*., p. 117.

> ment, and structure of the local legislature may still be that prescribed in the original constitution, its enactments are valid now not because they are the exercise of powers granted by a valid statute of the Westminster Parliament. They are valid because, under the rule of recognition locally accepted, enactment by the local legislature is an ultimate criterion of validity.[31]

Thus Professor Hart might be seen as pointing the way to an analysis of the events of 1965 in terms of two distinct theories adhered to respectively by the parent legal system and the embryonic system:

i) the parent system successfully devolved constitutional competence onto the embryonic system, though in law the parent could successfully reclaim that competence, and

ii) the embryonic system has asserted its own constitutional competence which cannot lawfully be abrogated or limited.

How would this view of matters be applied to Singapore?

First, one would have to concede the subordination of the Singapore legal system to the British grundnorm until 1963 (I pass over the Japanese occupation, but presumably if efficacy or the practice of officials is a question one would have to postulate a revolution in 1942 and a further counter-revolution, or restoration, in 1945). Thus during Singapore's status as a Crown colony the sovereignty of the British Parliament can be said to embody the grundnorm vis-a-vis Singapore.

Second, on 16th September 1963 a legal revolution took place when Singapore joined Malaysia and was thereby subjected to the Malaysian grundnorm, namely the proposition or set of propositions from which the validity of the Malaysian Constitution can be derived in Malaysian jurisprudence, namely that sovereignty was relinquished by Her Majesty under the Federation of Malaya Independence Act[32] (and presumably, impliedly, by the Malay Rulers also), and that the Constitution was ratified by the elected representatives of the people at Federal and State level. For Singapore's subordination to this constitutional arrangement one can refer to the (U.K.) Malaysia Act 1963[33] and the Malaysia Agreement 1963.[34]

Third, and crucially, we come to 9th August 1965.

According to Professor Hart's analysis the theory adopted depends on which legal system entertains the question. To explain 9th August 1965 one must, to follow this analysis to its logical conclusion, regard the Malaysian legal system as the parent, and the Singapore legal system as the offspring. In Malaysian jurisprudence the Singapore amendment was a valid Act passed constitutionally by the Federal

[31] H.L.A. Hart, *The Concept of Law,* pp. 116-7.

[32] Cap. 60. Interestingly enough, Section 1, Singapore Act 1966 (U.K.) acknowledged that Singapore became an "independent sovereign state separate from and independent of Malaysia" on 9th August 1965, and therefore acknowledged indirectly the displacement of the British grundnorm in Singapore under the (U.K.) Malaysia Act 1963.

[33] Cap. 35.

[34] London, H.M.S.O., 1963.

Legislature, which had the effect of cutting the umbilical cord and setting the nascent Singapore legal system free; whether or not the Singapore amendment was an example of good surgery, and whether or not it could be repealed — an interesting question to Malaysia — the Singapore amendment was effective and nothing else matters. For the offspring, matters are not so simple, but Professor Hart would presumably explain the matter in a way which would interpret the Singapore legal system as having its own local root, its own autochthony, and in which the Singapore amendment is, though an interesting historical fact, not, in Singaporean jurisprudence, law.

Does Professor Hart's model fit the facts? What are the consequences for Singapore and for constitutional supremacy and for the R.S.I.A.? To answer these questions we must re-examine the events of 1965.

4. THE R.S.I.A. vs. THE SINGAPORE AMENDMENT

One possible view of 9th August 1965 is as follows. The Malaysian legislature, by the Singapore amendment, granted sovereignty to Singapore. Furthermore, that Act, by providing for the retention of the State legislative and executive powers and the devolution of the Federal legislative and executive powers, gave Singapore its Constitution. When the Singapore legislature passed the Constitution (Amendment) Act 1965 it was acting under the 1963 Constitution, and when it passed the R.S.I.A. it was acting under the Singapore amendment and therefore under the Federal Constitution. This would appear to have been the view of the Speaker at the time, though the Prime Minister, proposing the Republic of Singapore Independence Bill, seems to have been less certain, as the following extract from the Parliamentary debate shows:

> "… The Prime Minister: Mr. Speaker, Sir, I beg to move, "That the Bill be now read a Second time."
>
> *Question put.*
>
> The Prime Minister: Mr. Speaker, Sir, on the question of the Constitutional procedure, again it will require a two-thirds majority on Second Reading.
>
> Mr. Speaker: Mr. Prime Minister, the obligation on me is that I have a two-thirds majority on the Singapore Constitution Bill, but no such obligation is put on the Assembly with regard to the Federal Constitution. If the House, however, feels that it would be safer this way, I have no objection, but I felt that there was no obligation on this House to provide a two-thirds majority of any amendment to a matter outside the Constitution of the State of Singapore.
>
> The Prime Minister: *Ex abundante cautela,* I would urge that the House take a division after the Committee Stage and on the Third Reading, the reason being as follows. Mr. Speaker, Sir, I think a strict interpretation of the responsibilities as set out in the State of Singapore Constitution Act refers to amendments to the Singapore Constitution. But it is open to anyone to urge upon the Judiciary that the passage of this Bill, in fact, does make a fundamental alteration to the nature of the Singapore Constitution enactment, for it incorporates into that enactment all the Federal powers which were, whilst we were in Malaysia,

part of the Federal Constitution. So that there can be no doubts about this matter, I would urge that the Bill be passed by a two-thirds majority and that a vote be taken.

Mr. Speaker: I entirely agree with Mr. Prime Minister that this would be the safer course, of course, and we will take it. If there is going to be any argument about it, this will put it out of court completely."[35]

There are a number of difficulties with the view apparently put forward by the Speaker.

First, the legislative power was vested by the Singapore amendment in the Government of Singapore. The intention and effect of this is not clear. The Act clearly does not intend "Government" to mean "Legislature", because the latter term is used in its ordinary meaning, *i£.* to refer to the Legislative Assembly, in section 7. It might be natural to conclude that, odd though it may be, the intention of the Act is to vest the Legislative power in the executive. If so, section 7 makes little sense because it clearly envisages the exercise of legislative power by the Legislative Assembly. It may therefore be that the intention was to vest the legislative power in the executive as an interim, transitional measure, and that that power would be returned in due course to its proper place with the Legislative Assembly. Even this possibility does not however explain section 7, which does not allow for amendment or repeal of laws by the executive. The result would be that the executive could make new laws but only the legislature could amend or repeal laws.

Secondly, the executive power is vested by section *5* of the Singapore amendment in the Government of Singapore, but the executive power referred to is that of the Parliament of Malaysia. Such executive power did not in fact exist under the Federal Constitution, for the executive power was vested in the Yang di-Pertuan Agong and was exercisable primarily by the Cabinet. Section 6 however could be regarded as vesting the executive power in the Yang di-Pertuan Negara, thus enabling it to be exercised by the Cabinet in Singapore.

All in all this is indeed a remarkable constitutional regime which would seem incongruous even in the pages of *Alice in Wonderland.* It is certainly unworthy of the auspicious occasion of its enactment.

Thirdly, and fatally for the Singapore amendment's claim to the title of founding document of Singapore's Constitution, certain of its provisions are actually contradicted by the R.S.I.A. In particular section *5* of the R.S.I.A. corrects section *5* of the Singapore amendment by vesting the legislative powers of the Yang di-Pertuan Agong and the Parliament of Malaysia in the President and Parliament of Singapore; and section 6 of the R.S.I.A. contradicts section 3 of the Singapore amendment by applying numerous provisions of the Federal Constitution to Singapore.

Thus it seems clear that, quite apart from the obvious objections to certain provisions of the Singapore amendment simply as constitu-

[35] Parliamentary Debates (1965) Cols. 453-4. The Bill was in fact passed, narrowly, by a two-thirds majority.

tional provisions, these defects in its claim to be the fundamental document in Singapore's Constitution mean that Singapore's jurisprudence just cannot afford to entertain such a claim. The constitutional regime has been established by the R.S.I.A.; if the Singapore amendment is prior to the R.S.I.A. in Singapore's legal system, then the chaos reigns — Parliament cannot legislate and the citizens of Singapore, contrary to their understanding, have never had the benefit of large portions of the Federal Constitution since 1965, at least if we believe section 3 of the Singapore amendment. The severing of the umbilical card, so salutary for the parent legal system, would be fatal for the infant legal system.

A second possible view of the R.S.I.A. is that envisaged by the Prime Minister as a possible constitutional objection to the R.S.I.A., namely that it is in effect a massive amendment of the 1963 Constitution.

This possibility need not detain us long. The legislative powers granted by the 1963 Constitution were circumscribed by the Federal Constitution, so that the Singapore legislature had no capacity under the 1963 Constitution to exercise plenary powers; still less had it the power to *grant itself* plenary powers. The 1963 Constitution referred in Article 42(1) to "The power of the legislature to make laws," from which it seems clear that the 1963 Constitution itself conferred no legislative power: that was done exclusively by the Federal Constitution with its elaborate provision for federal and state legislative competence.[36] Thus Parliament in passing the R.S.I.A. would have been acting under the 1963 Constitution only if that Constitution already conferred on Parliament plenary powers. It seems clear that it did not. Even if it had, one could only regard this metamorphosis as having been the result of the Singapore amendment, in which case this second view is no different to the first view. In fact the Singapore amendment made no mention of the 1963 Constitution and vested the legislative power in the Government, not the legislature; furthermore if Parliament already had the powers conferred by the R.S.I.A., most of the R.S.I.A. was unnecessary. As a parting shot, it should be noted that the R.S.I.A. itself at no point even purports to be an amendment to the 1963 Constitution. The Prime Minister's caution was indeed abundant, and the narrow achievement of a two-thirds majority for the R.S.I.A. need have occasioned no perspiration on his brow. The argument he feared was put out of court not by the special majority obtained but by sheer constitutional logic.

I therefore conclude that Professor Hart's model is forced on us not merely because it is attractive, but because it, or something very much akin to it, is necessary. We have failed to analyse 9th August 1965 in terms of constitutional devolution and the Singapore amendment. We must therefore explain it in terms of revolution and the R.S.I.A.

5. Legislative Supremacy

The true story can now at last be told. As our jurisprudential theorists will tell us, a grundnorm is different from other norms in that there is no criterion of its legal validity. One does not ask a weighing machine to weigh itself, or, to use an example of Hart's, one cannot

[36] Constitution of Malaysia, Ninth Schedule.

discuss the correctness or incorrectness of the metre bar in Paris which is the ultimate test of correctness of a distance of one metre. If one asks, on what legal authority the R.S.I.A. was passed, one must conclude, in light of the foregoing discussion, that it was passed on no legal authority at all, if by "legal authority" we mean pre-existing legal norms. We are here in a revolutionary situation, in which a new grundnorm is about to oust the old. We must therefore move away from law and consider facts, as enjoined by Kelsen and Hart.

There are no shots being fired, and there are no riots in the streets, only a group of legislators performing their task in the elegant surrounding of Parliament House. During some four months a Government owing its authority to the old legal order has governed the country. A "constitutional amendment" has been passed under which the State Legislative Assembly becomes the Parliament of the new Republic, and the Head of State becomes the President of the Republic, This amendment applies retrospectively from 9th August 1965, the date of *de facto* independence. "Parliament" now passes an Act, the R.S.I.A., which declares the sovereignty of the Republic, purports to dispose of the legislative, executive and judicial power, and to continue existing laws in force; it also makes transitional provisions and in effect ratifies the acts of the Government since 9th August 1965. The disposal of the legislative power by section 5 of the R.S.I.A. is particularly interesting — we have seen already that a legislature cannot grant itself plenary powers — either it has them or it has not, but should we not see the R.S.I.A., and in particular section, as an assertion of fact, the fact of legislative supremacy? The R.S.I.A. resembles a Constitution (albeit in some ways a provisional one) in all respects save one — it is a gift of the legislature. No Constitution authorises this gift because the Constitution is itself the gift. The Constitution is not the grundnorm, but merely a manifestation of the grundnorm. The grundnorm is the supremacy of the legislature. Parliament in passing the R.S.I.A. assumed the mantle of supremacy in Singapore.

To ask by what authority the R.S.I.A. was passed is the same as to ask by what right the English Parliament in 1688-9 governed England after the flight of James II, gave the throne to William and Mary and passed the Bill of Rights. Parliament comprised the elected representatives of the people acting in the best interests of a young, barely established, state. They exercised no *legal* powers in passing the R.S.I.A., for, like the English Parliament in 1688-9, they were laying down the foundations of a new legal order, even if, to all appearances, they were merely going about their usual task of legislating. Intriguingly, there are also important differences between 1688-9 and 1965. The English Parliament had been dissolved by James II, but the Legislative Assembly of Singapore had not been dissolved (except possibly by implication on the demise of the old state of Singapore as a state of the Federation) and the office of President had not previously existed, unlike the English Crown. The important similarity is that in 1688-9- Parliament in England *assumed* the right to alter the succession and limit the prerogative, thereby redefining the relationship between the King and his Parliament, while in 1965 Parliament in Singapore *assumed* the right to lay down constitutional provisions by passing an Act. Thus both Parliaments, by asserting legitimacy actually created it, while appearing all the time merely to be providing *continuity* of constitutional government. Thus in Kelsenian terms the R.S.I.A. is a manifestation of the grundnorm and its validity cannot be ques-

tioned — it is itself in effect the touchstone of validity of all legal activity in Singapore since 9th August 1965. The R.S.I.A. deserves respect. Its provisions have afforded a sure foundation and have served Singapore well for a generation. Singaporeans may feel they owe some of their success to the R.S.I.A. and the Honourable Members who passed it.

Honourable Members of what? The R.S.I.A. purports to have been enacted by the President with the advice and consent of the Parliament of Singapore. It will be recalled that the titles "President" and "Parliament" were substituted by the Constitution (Amendment) Act 1965 for "Yang di-Pertuan Negara" and "Legislative Assembly". If the R.S.I.A. is a fundamental document, then it is logically anterior (if chronologically posterior) to the Constitution (Amendment) Act 1965 (both, fortunately, were retrospective to 9th August 1965). Thus the R.S.I.A. was indeed enacted by the (self-proclaimed, but why not?) President and Parliament of Singapore and not by the Yang di-Pertuan Negara and the Legislative Assembly of the (by then) defunct State of Singapore.

On this analysis the curious jigsaw puzzle of Singapore's Constitution begins to make sense. The 1963 Constitution derives its authority from section 13(1) of the R.S.I.A. as "existing laws" within the meaning of that section, and similarly all subsequent amendments thereto and all modifications which appear in the Reprint (subject to what was said earlier in this regard). The Malaysian provisions derive their authority from section 6(1) of he R.S.I.A., and similarly all subsequent amendments thereto. Thus all the provisions which appear in the Reprint can be traced to the real and original Constitution of Singapore, the R.S.I.A.

The significance of this analysis of the Constitution now be seen. Parliament enacted the R.S.I.A. in the exercise of its supremacy. No other explanation of the R.S.I.A. fits the historical and legal facts. If Parliament enacted a constitution by the R.S.I.A., it can quite clearly enact another Constitution by another Act. The R.S.I.A., while fundamental, is not, in a regime of legislative supremacy, beyond the reach of a legislative majority. Thus the accepted notion of constitutional supremacy as the guiding principle in Singapore's Constitution is an illusion which rests on a fundamental misunderstanding of Singapore's constitutional history. It may be regarded by some as an illusion which is indispensable if the Constitution is to be taken seriously. I suggest however that it is hard to take seriously something which just does not make any sense. Perhaps, if it is any comfort to the disillusioned, a true sense of history and a sense of parliamentary democracy are better constitutional guarantees than a Constitution which exists only on paper. If, on the other hand, legislative supremacy is not thought to be a desirable theory for Singapore, it can, of course be altered. Even grundnorms can be changed.

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