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TRENDS IN CONSTITUTIONAL INTERPRETATION: OPPUGNING *ONG,* AWAKENING *ARUMUGAM*?

This article evaluates recent trends in the development of constitutional jurisprudence in relation to constitutionally safeguarded fundamental liberties. Particular attention is directed towards the methodology employed in constitutional interpretation in the 1995 Court of Appeal decision of *Jabar* v *PP*.

It is unlikely that anyone but a government official would regard the confirmation of government power as the purpose of law.[1]

I. INTRODUCTION

This article examines how Part IV of the Constitution has been interpreted since Parliament's overruling of the seminal case of *Chng Suan Tze* v *Minister of Home Affairs*[2] in 1989.[3] It examines the methodology adopted by the Court in the post-*Chng* era and assesses its impact on the constitutional review of constitutional liberties in general.

First, it considers how the Court of Appeal decision of *Chng* was legislatively overruled and notes the legislative resort to ouster clauses in what the executive deems to be politically sensitive matters. The jurisprudential basis and function of a Bill of Rights, the influence of naturalism and the methods of constitutional interpretation will then be examined. This article will then contextualise judicial review in the bigger context of the judiciary's role as a counter-majoritarian check in a government based on the separation of powers. Some difficulties inherent in the task of constitutional inter-

[1] P Allot, "State Responsibility and the Unmaking of International Law", [1988] 29 Harv JIL 1 at 2.

[2] [1989] 1 MLJ 69.

[3] Constitution of the Republic of Singapore (Amendment) Act 1989 (No 1 of 1989) which came into effect on 27 January 1989. For an overview of the developments under Internal Security Act law, see Yee, Ho & Seng, "Judicial Review of Preventive Detention under the ISA" (1989) 10 Sing LR 66. For the reasons behind the amendment, see Singapore Parliamentary Debates, 25 January 1989, Second Reading, Internal Security (Amendment Bill) cols 531-533; 463-474.

pretation and the 'sources' of law a judge is entitled to examine in construing the constitution will also be considered. Finally, major cases on judicial review are examined, with particular focus on the 1995 case of *Jabar* v *PP*.[4] *Jabar*'s case is not only one of the more recent, but is instructive in revealing the judicial attitude towards Part IV and how the Court perceives and discharges its constitutional role as a bulwark of fundamental liberties. Some concluding observations on the implications of the trend in constitutional review will be offered. The centralised control of power in a modern state leaves an individual vulnerable against potential undue intrusions into his 'sphere of privacy' by the Leviathan that is the State. The judiciary plays a crucial role in interposing itself between these two unequal actors and should serve as a guardian with a presumptive bias in favour of the weaker party. This was the approach advocated by the Privy Council in *Ong Ah Chuan* v *PP*.[5] However, it appears the *Ong Ah Chuan* approach was oppugned in *Jabar* while the literalist approach in *Arumugam Pillai* v *Government of Malaysia*[6] is currently in the ascendancy, with grave implications for the health of constitutionally safeguarded fundamental liberties.

II. CURBING *CHNG:* JUDICIAL SELF RESTRAINT VERSUS LEGISLATIVELY IMPOSED RESTRAINTS

In a landmark judgment, the Court of Appeal in *Chng* quashed a preventive detention order issued under the Internal Security Act (ISA). The Act[7] confers broad, intrusive powers on the Minister of Home Affairs to authorise detention orders curtailing the constitutionally guaranteed right to personal liberty. In quashing the ministerial order, the Court was serving as a check against a misuse of ministerial power. The Court in *Chng* exorcised the much decried ghost of *Liversidge* v *Anderson*[8] by affirming that ministerial discretion in issuing detention orders under the Internal Security Act (Cap 143) was subject to an objective test of review. It was in the hallowed case of *Liversidge*, which also pertained to national security and wartime insecurities, that Lord Atkin's in his now-vindicated dissent chided his peers for being 'more

[4] [1995] 1 SLR 617.
[5] [1981] AC 648.
[6] [1975] 2 MLJ 29.
[7] (Cap 143) This Act is validated by the Article 149(1) 'notwithstanding clause' which seeks to legitimise Acts derogating from constitutional liberties.
[8] [1942] AC 206.

executive-minded than the executive'. This approach is consonant with Commonwealth precedents as well. The Court in *Chng* acted on the foundational principle that "the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the court should be able to examine the exercise of discretionary powers."[9]

The Court in *Chng* was not indulging in unwonted activism[10] since it implicitly recognised that the judiciary should not transgress the executive realm when sensitive political issues were involved.[11] In affirming the objective test, the Court recognised the need for some measure of accountability in respect of ministerial power curtailing individual liberty. It also recognised the importance of its own role in this scheme of checks and balances. Not only did the Court affirm objective review on the basis of precedent fact review and the *GCHQ*[12] grounds of illegality, irrationality

9 *Supra,* note 2 at 82E-F.

10 This fear has been raised by Sin Boon Ann in "Judges and Administrative Discretion – A Look at *Chng Suan Tze* v *Minister of Home Affairs*" in [1989] 2 MLJ ci. At cv, he states with regard to the objective test that it is "difficult to ascertain the objective criteria which should be followed. The courts here have failed to provide any guidance .., it is difficult to see how reference to generalities like Parliament never intended that discretionary powers should not exceed the four corners that was intended provides any more assistance than saying that the 'President must be satisfied'. …The courts generally review executive decisions on such broad grounds as illegality, irrationality and procedural impropriety." He argues that the lack of precision in these terms "may lead to confusion and uncertainty over judicial standards." The answer to this is that the common law espouses many judicial tests which are far from precise such as the reasonable man test but which is capable of being concretised where applied to facts. The method of the common law is incremental and this flexibility is an asset because novel situations can be met through extrapolation from existing principles.

11 Sin further argues, *ibid,* at cvi, that the objective test runs the risk of opening the door for judges to substitute their opinions for ministerial ones with the latter being better qualified to make judgments in national security matters. He rhetorically asks "should we allow an institution that is not normally held to public accountability to have a free hand in determining the course of policy formulation and implementation?" His latter statement certainly overstates the point as judicial review is a reactive power rather than an initiatory one. Secondly, while the merits/legality dichotomy is one that is dangerously thin, the Court itself in the *GCHQ* case, endorsed in *Chng*, recognised this. This is reflected in its statement that it would only examine the existence of national security considerations but not the cogency which falls within ministerial discretion. Ultimately, the success of maintaining this distinction depends much on the good sense of legally trained and politically insulated judges. In principle too, the Court should have the final say over constitutional matters pursuant to the logic of separated powers, counter-majoritarianism and the principle of checks and balances. The alternative is that the fused legislature-executive wields untrammeled power, which is inimical to the idea of constitutional government and indeed, the rule of law.

12 *CCSU* v *Minister for the Civil Service* [1985] AC 374 (the GCHQ case).

and procedural impropriety, it went on to import the English doctrine of non-justiciability:

> It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security *requires* is to be left solely to those who are responsible for national security: *The Zamora* and *GCHQ* case. However, in these cases, it has to be shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.[13]

This is clearly a statement of judicial self-restraint. Nevertheless, the decision in *Chng* sufficiently discomfited Parliament for it to precipitate the legislative overruling of the case through constitutional and statutory amendments. Parliament's readiness and alacrity in remedying 'undesirable' aspects of a judicial opinion through the legislative process is one normally associated with political systems with no written constitution where the doctrine of parliamentary supremacy holds sway. Judicial review on substantive grounds was barred and review was severely restricted to questions of compliance with procedural requirements.[14] The law was effectively reversed and the 1971 decision of *Lee Mau Seng* v *Minister of Home Affairs*[15] which espoused the subjective test of review was reinstated. Of course, whether or not the common law can be permanently frozen in this manner is a highly debatable point.[16] At best, it can be said that the scope of judicial

13 *Supra,* note 2, at 83F-H.

14 S 8B(2), Internal Security Amendment Act (Act 2 of 1989) reads: "There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provision of this Act save in regard to any question relating to the compliance with any procedural requirement of this Act governing such act or decision."

15 [1971] 2 MLJ 137. For a comment on this case, see Daw, "Preventive Detention in Singapore" [1972] 14 Mal LR 276. On the possibility that judicial review may be possible on the ground of bad faith, see CM Chinkin, "Abuse of Discretion in Malaysia and Singapore" in AJ Harding ed, *Common Law in Singapore & Malaysia* (1985); but see also *Vincent Cheng* v *Minister of Home Affairs & Ors* [1990] 1 MLJ 449.

16 Michael Rutter, *The Applicable Law in Singapore and Malaysia: A Guide to Reception, Precedent and the Sources of Law in the Republic of Singapore and Federation of Malaysia*, (1989).

review of ISA cases is unclear. Two subsequent cases decided after the 1989 amendment[17] affirmed the effectiveness of section 8B(1) and (2) of the ISA in excluding[18] judicial review in respect of assertions of unconstitutionality, illegality or irrationality concerning any detention order. Judicial review seems to lie only in instances of procedural[19] impropriety and where there is evidence that the executive has acted ultra vires.[20]

[17] The constitutionality of this amendment itself was attacked in *Teo Soh Lung* v *Minister for Home Affairs* [1989] 2 MLJ 449 but dismissed by the judge who adopted an anaemic, positivist conception of the 'rule of law' which deviated substantially from the robust concept enunciated in *Chng Suan Tze* to the effect that all power has legal limits and the Court has the final say as to where these limits lie. Contrast this with Chua J's conception of 'law' at 457I-458A: "It is erroneous to contend that the rule of law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review or other actions. Parliament has done no more than to enact the rule of law relating to the law applicable to judicial review." On this conception of law, Parliament can enact whatever laws it wants so long as the requisite majority is mustered, regardless of its content. This implies that the constitution itself provides no standards aside from procedural limits which might constrain legislative power. Effectively, parliament is then supreme and constitutional supremacy, merely formal. The judge in the subsequent case of *Vincent Cheng* v *Minister for Home Affairs* [1990] 1 MLJ 449 adopted Chua J's judgment in *Teo*.

[18] On administrative law principles, Courts have circumvented ouster clauses by declaring that they can only review 'real' decisions and not 'purported' decisions which are those made without jurisdiction. See *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147; *Page* v *Hull University Visitors* [1993] 1 All ER 97; *Syarikat Kendaraan Melayu Kelantan Bhd* v *Tranport Workers' Union* [1995] 2 MLJ 317.

[19] It is interesting to note that in the Malaysian case of *Menteri Hal Ehwal Dalam Negeri* v *Lee Gee Lam* [1993] 3 MLJ 673, the Supreme Court adopted a rather broad definition of the word 'procedure' to circumvent the problem of non-reviewability concerning the Minister's subjective satisfaction under the Emergency Public Order and Prevention of Crime Ordinance (1969). "Procedural matter" was held at 678C to include "the question whether the Deputy Minister addressed his mind to the relevant limb (of the section) or to both limbs, in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Deputy Minister applied his mind to, the benefit must be given to the detenu." This sounds very much like the substantive ground of review whereby the Court may consider whether a decision maker took all relevant considerations into account.

[20] The executive is constitutionally required by Article 151(1) to give grounds of detention and factual allegations to a detenu under a preventive detention law. Article 151(3) allows it to invoke the privilege of non-disclosure of information in the national interest. Since the burden of proof lies on the detained to prove his detention unlawful, this will be a monumental if not impossible task . Much hinges upon the trustworthiness of the executive not to abuse these draconian powers. If the executive voluntarily furnishes the evidence, the court can presumably take it into consideration. In *Teo Soh Lung* v *The Minister of Home Affairs* [1990] 2 MLJ 129, it was argued that so long as the express ground of detention is related to national security considerations, a detention order would be valid. The factual basis was satisfied on the facts of *Teo* but it is open to argue that if the ground is unrelated to the purposes of the ISA, the court may review it for illegality.

This same method of legislatively curtailing judicial power rather than trusting the judiciary to act with self-restraint was also utilised in the context of the Maintenance of Religious Harmony Act (MRHA) which confers powers upon the minister to curb the freedom to propagate one's religion under Article 15.[21] The existence of unfettered discretion is always an exception to the rule of law since the wielder of such power is not subject to any legal limits in his exercise of discretion. The prospect of potential abuse cannot be denied. With judicial review severely truncated or wholly ousted, it was evident that the minister was effectively wielding absolute discretion. Consequently, with respect to the ISA and MRHA, it was decided that some form of political review would replace judicial review. It was in this context that the decision was made to append certain 'veto' powers onto the newly created office of the Elected President[22] whose original *raison d'être* was to serve as a guardian over fiscal matters and over the appointment of key civil servants. While the idea to have some check in place in lieu

[21] See ss 8 and 18 of the Maintenance of Religious Harmony Act (Cap 167A).

[22] In *Lee Mau Seng, supra,* note 15, Wee CJ said at 145H-I that: "the true safeguard that the Constitution and the Act provides, and is intended to provide, to the individual in respect of his fundamental right to liberty is that the power and the discretion to arbitrarily detain him without trial is conferred on the highest executive body in the country and on no other body or person." When the Elected President was given a new safeguard role over ISA detentions, this was motivated by the acknowledgement that the government might abuse its powers under the ISA. Paragraph 24 of the *Safeguarding Financial Assets and the Integrity of the Public Service*, The Constitution of the Republic of Singapore (Amendment No 3) Bill (Cmd 11 of 1990) at page 7 harked back to a ministerial statement made during the debates when the 1989 amendments to the ISA were being tabled: "The answer to possible abuse of ISA...cannot be judicial review...The answer must be political, that is, having another political body to exercise judgment on security cases, much the same way the Executive has done...to provide a second opinion and a check and a balance. We are working on this idea." Paragraph 25 concludes that "the safeguard should rest with the Elected President." This evinces a preference for political checks over legal checks where ISA detention powers are concerned. The degree to which political checks are effective depends on the degree to which elected officials are accountable and responsive to the electorate. Pursuant to this, a genuine choice between competing candidates is necessary – if there is no choice, what does a vote legitimate? Unfortunately, as it stands, the parliamentary elections system is such that while theoretically neutral, it results in most seats being uncontested: see Kevin Tan, "Constitutional Implications of the 1991 General Elections" in (1992) 12 Sing LR 26. This problem is likely to be exacerbated with the passing on 30 October 1996 of constitutional amendments to raise the number of candidates contesting a Group Representative Constituency from 4 to 6 (Act 41 of 1996). As far as presidential elections are concerned, the pool of people able to meet the elitist pre-selection criteria elaborated in Art 19 of the Constitution number less than 400 and the criteria is such that prospective candidates are likely to be pro-establishment, compromising the equal right of candidature.

of judicial review is commendable, one might question the efficacy of this check and the limited veto the Elected President wields.[23]

III. THE JURISPRUDENTIAL BASIS OF CONSTITUTIONAL LIBERTIES AND THE TWO GATEWAYS TO JUDICIAL CREATIVITY

The Court of Appeal's decision in *Jabar* is one of the more recent in a series of cases[24] which embrace a literalist, positivist approach towards interpreting that 'fundamental and paramount law of the land'.[25] The function of law in this conception is to affirm rather than to constrain power. A naturalist or 'spirit of the law' approach involves viewing judicial review as a technique by which the judiciary controls[26] legislation or administrative powers through importing substantive tests to which legislation must conform. The judiciary is tasked with vindicating the long term values embedded in the Constitution over the temporal values embodied in ordinary laws. The discernment and application of these values is necessarily a creative exercise. In contradistinction, a positivist 'letter of the law' approach to construing constitutional provisions firmly resists any jaunts into extra-textualism by avoiding any engagement in "adventurous extrapolation".[27] That such a possibility lies open to a judge stems from the very nature of a constitutional enumeration of rights,[28] collectively known as the 'Bill

[23] For a detailed treatment of the powers and function of the Elected President, see Thio Li-ann, "The Elected President and the Legal Control of Government" in *Managing Political Change: The Elected President of Singapore*, Tan & Lam eds, (1997) at 100-143.

[24] See, *eg, Teo Soh Lung* v *Minister for Home Affairs* [1989] 2 MLJ 449; *Vincent Cheng* v *Minister for Home Affairs* [1990] 1 MLJ 449; *PP* v *Mazlan* [1993] 1 SLR 512.

[25] *Marbury* v *Madison* (1803) 1 Cranch 137 (Supreme Court, USA). It is interesting to note that the supremacy of the constitution is reflected in the fact that it has been considered proper in cases where a person has been unlawfully deprived of the constitutionally protected right of personal liberty to award compensation not only for loss of liberty and attendant physical and mental distress, but also to mark departures from constitutional practice through the award of exemplary damages: see *Shaaban* v *Chong* (1969) 2 MLJ 219 and *Rookes* v *Barnard* (1964) AC 1129.

[26] Lord Diplock, "Judicial Control of Government" [1979] 2 MLJ cxl.

[27] *PP* v *Mazlan* [1993] 1 SLR 512 at 516D.

[28] This may be contrasted with the situation in countries like the United Kingdom where there is no written constitution or Bill of Rights. The British approach to civil liberties is inductive rather than deductive as civil liberties are residual common law liberties. Basically, whatever is not statutorily prohibited is permitted. Such civil liberties are derived from case law which have found no legitimate bar to prevent what the citizen wants to do. Of course, residual liberty may be regulated or taken away by an Act of Parliament. Under the Singapore Constitution, fundamental liberties are accorded more formal protection in that a two-thirds parliamentary majority is needed to pass a constitutional amendment bill seeking to amend the Part IV Fundamental Liberties Chapter: Art 5(2).

of Rights' (also variously known as a Charter of Freedoms or in the case of Part IV of our Constitution, a Chapter on Fundamental Liberties).[29]

There are two 'gateways' through which judicial creativity finds passage: through elaborating the content of abstract concepts, and in striking the balance between competing interests in the course of constitutional review. It should be evident from an elaboration of these 'gateways' that the judicial review of the Constitution is not a purely mechanistic process whereby answers are derived from the mere application of logic. The very nature of interpretation implies some degree of judicial creativity[30] and the pertinent factors informing this process are a judge's training and the jurisprudential school of thought that judge subscribes to. To debate whether or not a judge makes law is *passé*: the relevant question is whether or not the degree of judicial creativity manifested is acceptable.[31] Judicial discretion does not imply an absolute discretion but one which is curbed firstly by what Lord Diplock has called the great judicial virtue of modesty:

> the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal. Few of these questions are of a kind to which the best solution can be found by applying a judicial process or which the experience and training which a judge has acquired in the course of his career equips him to deal with better than other men. Most of them involve a choice between a whole range of possible solutions. The judge above all must resist a natural temptation to turn sociologist, economist, and politician, and in interpreting the written law to restrict that range of choice so as to exclude solutions which give effect to policies of which he himself strongly disapproves.[32]

[29] Nomenclature need not detain us here as 'Bills' or 'Charters' or 'Chapters' all essentially mean the same thing: a list of rights and freedoms which demarcate a line between the 'public' realm which the state may legitimately regulate and a 'private' realm or domain where such regulation would be illegitimate. This 'Public/Private' dichotomy has been criticised as artificial and merely begs the question: where does the dividing line fall and who conclusively draws this line?

[30] See "The Law-Making Power of the Judges and its Limits", in Cappelletti, *The Judicial Process in Comparative Perspective*, (1989) at 3 to 56.

[31] For a trenchant appraisal of judicial activism gone awry as far as the American Supreme Court is concerned, see generally Robert Bork, *Tempting of America: The Political Seduction of the Law* (1990).

[32] Lord Diplock, *supra,* note 26, at cxlvii.

Secondly, unwarranted judicial legislation is hemmed in by the need for the judicial institution to retain its legitimacy which rests upon its public reputation as an impartial and objective minister of justice. Justice or that self-evident sense of fair dealing must accord and bear resonance with the populace at large in accordance with community values as derived from the various religious or ethical systems adhered to by the citizenry.[33] If the public perceives the unelected judiciary to be imposing its own values which are out of sync with community values through free-wheeling social engineering from the bench, legitimacy will fast fly from this institution.

The two "gateways" opening up the possibility of judicial creativity merit elaboration. Firstly, these "lists" of rights are formulated in the abstract as general declarations with references to many-nuanced normative phrases like "liberty", "justice", "due process" and "in accordance with the law". Such abstractions need concrete expression and a judge is positioned to enflesh the skeleton by elaborating upon the content of these terms. The philosophical or jurisprudential school of thought a judge may subscribe to will deeply influence this process. Secondly, none of these constitutional rights are couched absolutely[34] but are formulated in terms of a 'constitutional bargain'.[35] There is an implicit recognition that a trade-off exists between private rights and 'public goods' or the community's collective interests in public order, health and morality which sustains the very concept of society. Since fundamental liberties are subject to derogation clauses,

[33] A difficult problem of course arises if community values which comprise the majority view are blatantly immoral according to universal standards, *eg,* racist or oppressive government such as Nazi edicts authorising the genocide of German Jews or the offensiveness of the former South African *apartheid* regime. In such an instance, the Court must stand as a counter-majoritarian check to protect the interests of the minority. See Thio Li-ann, "Accountability of the Judiciary", a paper presented at the AIDCOM Regional Seminar on "Media and the Role of an Independent Judiciary in a Democracy", Bangkok, Thailand 27-28 August 1996 (forthcoming).

[34] Even when civil liberties are apparently couched absolutely, the judiciary reads limits into the extent of constitutionally protected freedoms. For example, the American First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Nevertheless, the Supreme Court has read limitations into the free speech and freedom of religion clauses: see Ch VII "Freedom of Expression" and Ch VIII "The Constitution and Religion" in Stone, Seidman, Sunstein, Tushnet, *Constitutional Law* (2nd ed, 1991).

[35] Lai Kew Chai J in the case of *Lee Kuan Yew* v *Jeyaretnam* [1990] 3 MLJ 322 in the context of discussing the Article 14 free speech clause acknowledged at 333C-D that "Freedom of speech is in terms of Article 14 subject to or restricted by the law of defamation, much like the underlying concepts and constitutional bargain which are expressed by Art 10 of the European Convention of Human Rights."

it falls to the task of a judge to balance these competing interests (once again a function of ideology) and to engage in the difficult task of line-drawing.

A. *The Judiciary as Impartial Arbiter or Partial Guardian?*

In the process of constitutional adjudication, should the judge don the cap of the impartial umpire? This means that the Court is called to adjudicate and weigh the competing interests of two equally positioned disputants. However, in the realm of public law, the relationship between the State and the Individual is a patently unequal one. The individual stands vulnerable *vis-à-vis* the State and the full plenitude of state apparatus the elite who hold the reins of State wield. Pursuant to the constitutional values which espouse the separation of powers, limited government and the paramount importance of safeguarding individual liberties, the Court should interpose itself between the State and Individual and serve as a bulwark against undue government encroachment into the private realm. As a matter of constitutional principle, the Court should adopt the partial stance of a Guardian of Individual Rights: Justice should not be blind but should keep an eye out for the Individual. As former Indian Chief Justice Bhagwati has observed:

> ...the judiciary stands as a bulwark between the citizen and State. It is the guardian of individual liberties. It is the greatest institutional safeguard against majoritarian excesses and against abuse or misuse of power. It must not shirk from discharging its function as protector of individual liberties against excesses by the State...when the judiciary strikes down any legislative or executive action, it does not set itself in polarity against the legislature or the executive. It merely seeks to ensure observance of the Constitution and the law and it is that spirit that the other two departments of the State must view judicial intervention...It is part of constitutionalism.[36]

In a constitutional democracy where the majority rules but where minority rights are protected,[37] the Court must serve as a counter-majoritarian check as this itself legitimates government institutions rooted in majoritarian democracy in the context of a pluralist society. As Canadian Chief Justice Antonio Lamer noted:

[36] Justice PN Bhagwati, 'Role of the Judiciary in Developing Societies: New Challenges' in *Law, Justice and the Judiciary: Ttransnational Trends,* Tun Mohamed Salleh Abas & Visu Sinnadurai, (1988) at 36-37.

[37] Jon Elster, "Majority Rules and Individual Rights" in *On Human Rights: The Oxford Amnesty Lectures* 1993, Shute & Hurley eds at 175-216.

> We are not accountable to the majority. You don't need judges if the majority is going to get its way all the time. You need judges for minorities. The police are quite capable of upholding the law when they are right. It's when they are wrong in their interpretation of the law that you need the judge … (who is) accountable to the law and the Constitution…. It is the electorate who guarantee it is a democracy. They vote. It is the judges who are the watchdogs to see that the democracy remains a free one.[38]

Aside from the disproportionate balance of power between the State and Individual and the accepted logic of checks and balances, another very cogent reason for adopting a presumptive pro-individual bias *prior to* the balancing process is the very nature and *raison d'être* of the Bill of Rights itself. As an idea, it first originated in American constitutional thinking.[39] As a caveat, it might be observed that one should not fall prey to the 'genetic fallacy' of rejecting an idea simply because it was born in a different time, place and culture.[40] A free and democratic people may, pursuant to the principle of self determination, choose to examine all propositions and ideas on their merits and to adopt or reject such ideas subsequent to such an examination. We must not be beguiled by the falsity of the 'West/East' divide when it comes to ideas.

B. *Naturalism and the Centrality of the Human Being*

Jurisprudentially, the constitutional guarantee of human rights rests on the basis of naturalism and the understanding that law exists to promote justice

[38] Canadian Chief Justice Antonio Lamer quoted in the *Straits Times,* "Canadian CJ: A growing demand for accountability", 3 September 1996. Full text of speech may be found in [1996] 8 SAcLJ 291.

[39] See generally Louis Henkin, "A New Birth of Constitutionalism" in *Constitutionalism, Identity, Difference, Legitimacy: Theoretical Perspectives,* Michel Rosenfeld ed (1994).

[40] As declared by present International Court of Justice Judge CG Weeramantry, "Aversion to colonialism…and a respect for the antiquity of the Third World tradition must not obscure the fact that one of the grandest intellectual concepts that has emerged in the long history of justice-thinking is the concept of the Rights of man as developed in the West. The philosophy of natural law, built upon an ancient base by such philosophers as Locke, Rousseau and Bentham in Europe, and Thomas Paine and Thomas Jefferson in American, and their flowering in the American Declaration of Independence and the French Declaration of the Rights of Man – all these are the property, the achievement and the inheritance of all mankind." CG Weeramantry, *Equality and Freedom: Some Third World Perspectives* (1967) at 67.

and a just order, rather than the enforcement of law and order, however attained. The overriding goal of establishing a just order as a constitutional value necessarily envisages a limited government.

A written constitution represents a synthesis of the virtues of naturalism and positivism. The abstract values and immutable ideals which naturalism propounds and which are necessarily vague are "positivised" by being incorporated into written law – the Constitution. Thus, normative ideals are invested with legal significance. These values are given practical, real world effect through the judicial role in interpreting and applying the Constitution and the values contained therein. As Professor Cappelletti has observed:

> [The] active work of the judiciary makes the vague terms of constitutional provisions concrete and gives them practical application. Through this work the static terms of the constitution becomes alive, adapting themselves to the conditions of everyday life, and the values contained in the "Higher Law" become really effective. Hence, the framework of modern constitutions and judicial review synthesize the ineffective and abstract ideals of natural law with the concrete provisions of positive law. Through modern constitutionalism … natural law, put on an historical and realistic footing, has found a new place in legal thought.[41]

A Bill of Rights is committed to the liberal principle of normative individualism which is, in essence, the belief that the primary normative unit is the individual rather than the state: the end of the state is to benefit, serve and protect their components, human beings, who are to be treated as an end in themselves, not simply a means to some other end, a cog in the machine as it were. It drinks from the stream of thought which dates back to Judeo-Christian doctrine of personality[42] and the central value of the human being created *imago dei.* This was later secularised in various forms such as that of Immanuel Kant's notion of the categorical imperative (a universally binding requirement derived from rationality) that one is enjoined to "act in such a way that you always treat humanity, whether in your own person or any other never simply as a means but always at the same time as an end".[43] This principle of personal dignity forms the

[41] Mauro Cappelletti, *Judicial Review in the Contemporary World,* (1971) at viii.

[42] Carl J Friedrich writes "The insistence upon the individual as the final value, the emphasis upon the transcendental importance of each man's soul, creates an insoluble conflict with any sort of absolutism." *Limited Government: A Comparison* (1974) pp 12-13.

[43] Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (1785) quoted in Simon Blackburn, *The Oxford Dictionary of Philosophy* at 57.

[44] The 1948 Universal Declaration of Human Rights opens with "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

basis of the modern day human rights movement[44] which rode on the wings of the post-World War Two "natural rights"[45] revival. This asserts the *a priori* normative premise that a human being by virtue of being human has intrinsic worth and dignity and should be treated as such. This is reflected in Lord Diplock's characterisation of the common law:

> ...the common law is something more than a fixed set of rules, it is a distinctive mode of legal reasoning by which to reach in changing circumstances fresh solutions to the problem of insuring fair dealing between citizen and citizen and between citizen and government. In short, it generates an attitude of mind.[46]

Notably, Article 2[47] of the Singapore Constitution defines 'law' as including within its ambit the common law and the principles of fairness such a legal system seeks to serve. Article 2 is expressed inclusively rather than exclusively and thus where gaps and ambiguities arise in the statutory scheme of things, the common law and its principles may fill in these gaps and clarify these ambiguities.

These philosophies which espouse a high view of the Individual do not serve as *carte blanche* for placing the individual as the centre of the universe, oblivious to the urgent pressing needs of others. That would open the door to the selfishness of hedonistic egotism and ignore the legitimate claims Society has on its members. Civic rights operate in the context of civic responsibilities. But then, neither should Statist-oriented theories from such diverse theorists as Hobbes, Hegel or Confucian humanism be allowed to subjugate the individual to the "false god of Society".[48] There is a necessary tension between the individual as a human being and a social being and this tension is acknowledged in the formulation of constitutional liberties

[45] Sidorsky, "Contemporary Reinterpretations of the Concept of Human Rights" in *Essays on Human Rights 88* (1979) Sidorsky ed.

[46] Lord Diplock, *supra,* note 26, at cxli.

[47] "Law" includes written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore."

[48] Malaysia's Deputy Prime Minister Datuk Anwar Ibrahim has noted: "To say that freedom is Western or un-Asian is to offend our own traditions as well as our forefathers who gave their lives in the struggle against tyranny and injustices. It is true that Asians lay great emphasis on order and societal stability. But it is certainly wrong to regard society as a kind of false god upon whose altar the individual must constantly be sacrificed. No Asian tradition can be cited to support the proposition that in Asia the individual must melt into the faceless community." "Media and Society in Asia", keynote speech at the Asian Press Forum, Hong Kong 2 December 1994 at 3-4.

with derogation clauses. This explicitly recognises that human beings are not atomistic isolated hermits but members of community. A judge is to balance these competing concerns and not allow one to overwhelm the other. There is more than enough room within the balancing process for a judge to give effect to the group-oriented[49] predilections of the local culture where warranted. There is thus no inherent incompatibility between the individual-centric basis of the Bill of Rights and more group-centric cultural norms: they have a mutually moderating effect *inter se*.

Malaysian and Singapore case law both afford precedents which reflect the high view of the individual in constitutional construction. In the seminal case of *Ong Ah Chuan* v *PP*, Lord Diplock advocated:

> …a generous interpretation, avoiding what has been called the 'austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

A generous interpretation was

> to treat a constitutional instrument such as this as *sui generis* calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.[50]

The Singapore Court of Appeal in 1989[51] reiterated this principle which affords a presumptive bias in the individual's favour in the balancing process. Similarly, in a fairly recent Malaysian case, Edgar Joseph SCJ observed:

> In construing constitutional documents, it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. Whenever legally permissible, the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy.[52]

[49] Francis Fukuyama, "Asia's Soft Authoritarian Alternative" in *New Perspectives Quarterly,* Spring (1992) at 16-17; Shared Values White Paper Cmd 1 of 1991 (ordered by parliament to lie upon the Table); Yash Ghai, "Asian Perspectives on Human Rights", [1993] 23 *HKLJ* No 3 342.

[50] [1980] AC 319 at 328-329.

[51] *Supra*, note 2, at 81-82.

[52] Edgar Joseph Jr SCJ, *Dewan Undangan Negeri Kelantan* v *Nordin bin Salleh* [1992] 1 MLJ 697.

The Privy Council in *Ong Ah Chuan* v *PP* gave concrete expression to this approach through its definition of the word 'law' in the context of the term 'save in accordance with the law' as stated in the Constitution. 'Law' did not simply mean a by-product of the legislative process whereby a bill before Parliament makes it passage through three readings and the receipt of the presidential assent to enacted law. The Privy Council rejected the narrow view of 'law' propounded by the Public Prosecutor who argued that what "in accordance with the law" constitutionally required was merely, in the context of Article 9, that the deprivation of life or personal liberty be according to the terms of an Act of Parliament. The content of such legislation was not a matter for the purview of the Court. In this conception, the judicial role is a severely truncated one, limited to ensuring that an Act has been validly enacted and that its provisions have been applied. This affords cold comfort to an individual facing draconian and intrusive provisions in an Act which has traveled the valid legislative route. Judicial review in this conception poses no substantive obstacle to the potential legislative invasion into the sphere of civil liberties.

This is precisely the approach adopted in the case of *Arumugam Pillai* v *Government of Malaysia.*[53] What was at issue in that case was whether the exacting of income tax under the terms of the Income Tax Act (1967) was done in a manner contrary to Article 13(1) of the Malaysian constitution which reads that 'no person shall be deprived of property save in accordance with the law.' The appellant had appealed against the construction of the term 'in accordance with the law'. However, Gill CJ affirmed a formalistic interpretation of "law"

> the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature ... whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be.[54]

In reading 'law' narrowly and rejecting the argument that the term should embrace principles of social and political justice, Gill CJ borrowed heavily

53 *Supra,* note 6.
54 *Ibid,* 29 C-D.

from the reticence expressed by the Supreme Court of Burma in the case of *Tinsa Maw Naing* v *The Commissioner of Police, Rangoon*[55] caused by the spectre of what Professor HLA Hart has called the 'Nightmare'[56] of judicial legislation: it was feared that the acceptance of natural law as a higher law invalidating inconsistent positive law would be chaotic since this would entail difficult questions like the source of natural law and its inherent vagueness.[57] Because it is unwritten law, opponents to natural law fear that it might merely serve as a convenient catch-all for whatever ideology or social agenda a judge declaring the unwritten law might wish to see in place. This rejects the view that the principles of natural law can be objectively discerned forwarded by such eminent scholars of the law as William Blackstone[58] or even Cicero's conception of the law as "one eternal and unchangeable law binding all nations through all time."[59] In its revised perception, 'natural law' becomes a theoretical vacuum which may be filled by the policy *du jour*:

> With changing social and political conditions notions regarding natural law change; all that remains constant is the appeal to something higher than positive law. Rules of natural law are the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which

55 [1950] Burma Law Reports 15.

56 Professor HLA Hart described American constitutional jurisprudence as oscillating between the 'Nightmare' and the 'Noble Dream': The Nightmare is that judges make up law as they go along while the Noble Dream is the that judges never make law but simply apply existing principles already embedded in the law: "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream" (1977) 11 GA L Rev 5.

57 Despite the charge that natural law and its source are 'vague', the virtue of the naturalist school is that it directs one to consider the underlying purpose behind the law. General concepts can always be elaborated upon in concrete situations and the flexibility of this approach allows novel situations to be treated *via* analogy with existing law. The set of rules which vindicate the administrative law precept of a right to a fair hearing (*audi alteram partem*) developed incrementally.

58 The declaratory theory conceives of a judge 'declaring' pre-existing law, in much the same way Newton declared the pre-existing law of gravity. The sources of law either stem from revelation or reason and this involves the judge in extra-textualism and sometimes, the extra-material realm. A positivist who bases his epistemology on empirical observation would refuse to enter the metaphysical realm to find it in immanent principles of justice. Suffice it to say that legal positivism which is entirely humanistic in nature is not universally accepted and is by no means the dominant world view. In his *Critique of Practical Reason*, Kant declared that "Two things move the mind with ever increasing admiration and awe, the oftener and more steadily we reflect on them: the starry heavens above and the moral law within." quoted in Simon Blackburn, *Oxford Dictionary of Philosophy* (1996) at 206.

59 Cicero, *De Republica* as quoted by Corwin, *The "Higher Law" Background of American Constitutional Law* (1963) at 10.

> positive law should strive to conform. But to accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos. There is no certain standard and no measuring rod by which the so-called principles of natural justice can be ascertained or defined. Each judge administering, natural law would be a law unto himself. In seeking to escape from the arbitrary exercise of power by the State the exponents of this principle would but place themselves under the exercise of arbitrary powers by judges.[60]

The Burmese Supreme Court had previously advocated that there should be a presumption that enacted law is constitutional. This was subsequently affirmed by the Malaysian Federal Court in *Arumugam* where it was held that a law not be allowed to stand as an expression of the national will only where it was clear beyond reasonable doubt that the legislation had exceeded its competence by transgressing constitutional limits.

This begs the question: when does the legislature exceed its competence? This is as much an interpretive question as imputing a purposive meaning to the constitutional term 'law'. Is the will of the legislature untrammeled, subject to no constraint other than what political expediency and conventional morality affords? Does the Constitution itself by expressly providing for legislative qualifications to constitutional liberties allow the legislature *carte blanche* to pass derogating legislation of whatever nature, however unreasonable, arbitrary or immoral so long as it musters the requisite majority (a foregone conclusion in a dominant one party state) for passing the bill? Are there no legal principles which guide and validate the exercise of legislative power, enforced through the mechanism of judicial review?

If not, then Parliament is in effect supreme and is subject to no legal checks, only the political checks of the ballot box, interest group pressures and the watchdog presence of an independent press.

The doctrine of parliamentary supremacy[61] (unlimited legislative authority) as practiced in such countries as the United Kingdom which has no written constitution is actually an expression of faith in the effectiveness of political checks and the self-correcting nature of democracy with the will of the parliamentary majority being concordant with the will of the

[60] *Supra*, note 55 at 27.

[61] For a classical treatment of the subject, see AV Dicey, Part I "The Sovereignty of Parliament" in *An Introduction to the Study of the Law of the Constitution* 10th ed. (1982). For a modern analysis of the doctrine, see AW Bradley, "The Sovereignty of Parliament – in Perpetuity?" in Ch 3 of Jowell & Oliver, *The Changing Constitution* (1994).

popular majority. In this conception, Parliament serves as a check on government and the exercise of executive power. This is a mythical and false assumption[62] in the context of the modern day pluralist society. Not only does the parliamentary executive control Parliament through the vehicle of the party system, the mandate wielded by the parliamentary majority is at best imperfect[63] and temporal. Judicial review leaps into the fray as an important counter-majoritarian check.[64] It is the method by which fundamental constitutional values 'trump' the short term values embodied in legislation. Historically, judicial review arose as a response to the post-Holocaust fear that laws as evil as those contained in Nazi edicts might be promulgated without check by the legislature:

> ...the nineteenth century was heavily influenced by positivist thought, which feared any attempt by the judiciary to impose higher or constitutional standards on ordinary legislation. The popular legislature was seen as the only source of law, and its statutes were to control all cases brought before the courts. When the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of principles once considered immutable. They began, in a sense, to 'positivize' these principles, to put them in written form and to provide legal barriers against their violation.[65]

62 See PP Craig, *Administrative Law* (3rd ed, 1994) at 4-40.

63 This is especially so where the workings of an electoral system lead to a disproportionate disparity between the number of votes won and the number of seats this translates into. For example, the working of Singapore's two-tiered electoral system whereby elections are conducted on the basis of single member constituencies and multi-member constituencies known as "Group Representative Constituencies" (GRC) has resulted in the total opposition vote of about 38.7% translating into less than 5% of the 81 elected Parliamentary seats. Furthermore, most GRC wards are uncontested which has meant that candidates of the incumbent political party have entered Parliament by 'default' without going through the hustings. If so, it might be asked, what does a vote legitimate where there is a lack of a real choice? For an examination of the GRC scheme whereby 3 to 4 prospective parliamentarians run as a team, see Thio Li-ann, *The Post Colonial Evolution of the Singapore Legislature: A Case Study* [1993] SJLS 80 at 104-108 and *Choosing Representatives: Singapore does it her way*, in *The Peoples' Representatives: Electoral Systems in the Asia-Pacific Region*, Hassall & Saunders eds, (1997) at 38-58; Kevin YL Tan, "Constitutional Implications of the 1991 General Elections" (1992) 13 Sing LR 26. On 1 October 1996, the government tabled a constitutional amendment bill which includes a proposal to raise the maximum number of GRC team members to six: see section 14, Constitution of the Republic of Singapore (Amendment) Bill No 36/96 which proposes to amend Art 39A of the Constitution. General Elections were held in January 1997 with 8 single member constituencies. The remaining GRC wards were contested on the basis of teams of MPs ranging from 4 to 6 members in size.

64 *Supra,* note 37.

65 *Supra,* note 41, at 118.

The function of the judiciary is not only to interpret written law but to declare unwritten law or the principles inherent in the concept of law, whether undergirding the common law or embodied as a constitutional value. Principles or non-rule standards which are the lifeblood of the law are part of what Dworkin[66] termed the law's "seamless web" which a judge is entitled to have recourse to in the interpretive process. In the local context, the Privy Council in *Ong Ah Chuan* v *PP* declared that the meaning of 'law' in the context of Article 9 of the Singapore Constitution was not merely enacted law but referred to

> a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12(1) would be little better than a mockery.[67]

In so doing, the Privy Council rejected the argument of the Public Prosecutor in *Ong Ah Chuan* to the effect that 'law' meant an Act of Parliament with the implication that one could be deprived of personal liberty "however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be."[68] The sole concession was the limitation operating on legislative power to enact laws derogating from constitutional liberties was that such Act, however unreasonable or otherwise must apply generally so as not to offend the prohibition against equal protection among similarly situated people contrary to Article 12 of the Constitution.

C. *Common Law & Constitutional Guarantee of Individual Rights*

Part IV is phrased to allow certain kinds of law to derogate from fundamental liberties. In this context, 'law' cannot simply mean enacted law. If so,

[66] See generally Ronald Dworkin, *Law's Empire* (1986) and *Taking Rights Seriously* (1977).
[67] *Supra,* note 5, at 71B-D.
[68] *Supra,* note 5, at 70G.

constitutional liberties could be curtailed by legislation in the same manner as common law rights in legal systems without written constitutions. Common law rights are residual in nature and derived at through the inductive method: one is free to pursue a certain course of action so long as this is not statutorily prohibited; the scope of individual freedoms can be deduced from examining case law decisions which find no express prohibition on a certain course of action. In contrast, in countries where constitutions incorporate an express declaration of rights, the concrete content of these rights is derived from deduction. As Dicey puts it thus:

> individual rights are deductions drawn from the principles of the (written) constitution whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals.[69]

Theoretically, constitutional rights are afforded more protection (reflective of their greater importance?) than common law rights in two ways. First, a constitutional right can only be abrogated or abridged through a constitutional amendment which requires a qualified majority to be passed where 'controlled'[70] constitutions are concerned. A common law right can be taken away by an ordinary piece of legislation. Secondly, a common law guarantee of individual rights limits only the executive and not the legislature. Courts in common law jurisdictions do not consider individual rights to be unalterable by virtue of embodying eternal reason and hence place no fetters on the hands of the legislature to interfere with private rights by statute law. The legislature in England was constrained by the libertarian tradition of the common law and its system of justice. As Nwabueze has observed in the context of former African colonies:

> It would have been wishful thinking to imagine that such a legislature, in an atmosphere dominated by tribal or racial sentiment, would have been tolerant as the British had been, towards the right to criticise and oppose the government. Self restraint and respect for the rights of minorities are ingrained in the British tradition, but they are qualities

[69] Dicey, *An Introduction to the Law of the Constitution* (1982) at 197-198. As Dicey points out, individual rights are part of England's judge made constitution which were secured by decisions of the courts, extended or confirmed by the Habeas Corpus Acts: see pp 196-197.

[70] For the distinction between "controlled" and "uncontrolled" constitutions, see the judgment of Birkenhead LC, *McCawley* v *The King* [1920] AC 691. See also KC Wheare, *Modern Constitutions* (1962).

> it would have been imprudent to expect the new legislatures to have acquired in anything like a sufficient measure to counteract the blinding sentiment of tribal, racial or religious politics and so make meaningful a 'presumption that the constitutional guarantee of principles of civil and political liberty is unnecessary'.[71]

Having a justiciable Bill of Rights was thus a means of extending to the legislature the kind of control the common law exerted *vis-à-vis* the executive. This has a crucial bearing on the meaning of 'law' in the context of the constitution. In common law jurisdictions, if 'law' simply meant enacted law,

> a constitutional guarantee achieves nothing if it merely says no one is to be deprived of his civil liberties save in accordance with law. For then it does no more than re-state an existing principle that the executive cannot interfere with private rights without legal authority. But it does add something to the existing law if the prohibition is extended to the legislature as well.[72]

Hence, "law" must mean something beyond enacted law if it were not to be superfluous and redundant. Being qualitative, it must refer to some system of law.

It is also generally understood that in former British colonies which inherited the Westminster system of government, the rights enumerated in a constitutional chapter are not exhaustive. Since the basis of this list of rights are the common law, bills of rights may not merely entrench new rights *de novo*,[73] they also declare and preserve rights existing in the common

[71] BO Nwabueze, *Constitutionalism in the Emergent States* (1973) at 40.

[72] *Ibid,* note 71, at 41.

[73] For example, the 1966 Wee Chong Jin Constitutional Commission had recommendation that four new rights be incorporated into the Singapore Constitution. These included the prohibition against torture or inhuman treatment, the right to vote and the right to apply to courts for the enforcement of violations against constitutional liberties: see Chapter II of the Report which can be found in Appendix D of Tan, Yeo & Lee, *Constitutional Law in Malaysia and Singapore*, (1991).

[74] In *Riley* v *AG of Jamaica* [1983] AC 719 at 729 D-G, Lords Scarman and Brightman approved of statements made by Devlin in *DPP* v *Nasralla* [1967] 2 AC 238 and Lord Diplock in *de Freitas* v *Benny* [1976] AC 239 that Chapter III of the Jamaican constitution which bears a strong family resemblance to the constitutions of other former British dependancies proceeded on the basis that "the presumption that the fundamental rights and freedoms which it declares and protects were already recognised and acknowledged by the law in force at the commencement of the Constitution. It is further true that, generally speaking and subject

law.[74] This is supported by the fact that certain rights are couched in such a manner as to presuppose there being pre-existing rights. For example, Article 9 provides that 'no person shall be deprived of life or personal liberty'. This presumes that there is an existing right to personal liberty and life which in some instances may be derogated from. Where constitutionally entrenched, these pre-existing common law rights are now asserted not only against the executive but now present a limit on legislative power as well. If a bill of rights was an exhaustive statement of the full sum of individual rights which is at best doubtful, there can be no call for the Court to engage in extra-textualism in the finding of new fundamental rights. But if a bill of rights is declaratory of rights already existing in the common law,[75] recourse can be had to the unwritten principles forming the backbone of the law.

Fundamental rights can be strengthened if such liberties as 'personal liberty' are treated more expansively[76] as a composite bundle with varied attributes. Rights as broadly drafted as 'personal liberty' may be meaningless if unsupported by unspecified, implied rights. The test adopted in the Indian case of *Maneka Gandhi* v *Union of India*[77] was that an unenumerated right was a constitutional right if it were of the same nature of the enumerated right or facilitated the latter. 'Personal liberty' under Article 21 of the Indian Constitution was a 'vast sphere' which might overlap with other express fundamental rights. It was of "the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights."[78] Were

to adaptations and modifications, the law was the law of England. The contribution which the Constitution makes to the jurisprudence of Jamaica is that it offers to every person in Jamaica the protection of a written constitution in respect of the rights and freedoms recognised and acknowledged by the law; and "law' means both the pre-existing law so far as it remains in force and the new law arising from the Constitution itself and from future enactment."

75 To avoid the implications that the Bill of Rights was exhaustive, the Ninth Amendment to the United States Constitution provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

76 A restrictive construction of personal liberty as meaning simply freedom from bodily restraint was adopted in the Malaysian case of *Government of Malaysia* v *Loh Wai Keong* [1979] 2 MLJ 33.

77 [1978] 2 SCR 620.

78 [1978] 2 SCR 621 at 669B to 670A-H.

79 The Indian Court has in recent years displayed a very expansive approach towards the meaning of 'life', extending it to mean not just mere animal existence but including the 'finer graces of human civilisation'. Hence 'life' under Article 21 of the Indian Constitution has been interpreted to include the right to pure drinking water and unpolluted air: *Antony* v *Commissioner* (1994) 1 KLT 169.

this expansive approach adopted, the right not to be deprived of life[79] or personal liberty 'save in accordance with law' could be given substance by implying 'supporting' rights necessary to make these terms meaningful. This might encompass the right to travel abroad[80] or the right to legal aid or an expeditious trial in addition to the other criminal process rights specifically articulated in the Constitution.[81]

D. *Lex or Jus?*

The Privy Council's purposive approach in identifying certain principles of a fundamental nature constituted an attempt to exempt these principles from parliamentary legislation. This methodology[82] dates back to the pre-positivist period when Sir Edward Coke and other seventeenth century expositors of the supremacy of law asserted the judicial right to interpret statutory laws in accordance with the common law. In *Dr Bonham's case* (1610, Common Pleas), Coke's reference to the fundamental values intrinsic in the common law dating back to Henri le Bracton[83] in the thirteenth century

[80] The Indian Supreme Court in *Satwant Singh's case* [1967] 3 SCR 525 held that the expression 'personal liberty' in Art 21 of the Indian constitution included the right to travel abroad and that no one could be deprived of this right save in accordance with procedure established by law which could not be arbitrary, unreasonable or unfair, falling below natural justice standards.

[81] See Art 9(2),(3) and (4) and Art 151 of the Singapore Constitution, for example.

[82] Carl J Friedrich, "Judicial Review of Legislative Acts; the Guardianship of the Constitution" in *Constitutional Government and Democracy* (1950) at 222-236.

[83] Henri Le Bracton was an English judge living in the 13th Century who said "And that he [the King] ought to be under the law appears clearly in the analogy of Jesus Christ, whose vice-regent on earth he is, for though many ways were open to Him for His ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would not use the power of force but the reason of justice." Bracton, *De Legibus et Consuetudinibus* translation, Harvard-Belknap (1968). In commenting upon this passage, Francis Schaeffer explains "God in His sheer power could have crushed satan by his revolt by the use of that sufficient power. But because of God's character, justice came before the use of power alone. Therefore Christ died that justice, rooted in what God is, would be the solution. Bracton codified this: Christ's example, because of who He is, is our standard, our rule, our measure. Therefore power is not first, but justice is first in society and law. The prince may have power to control and to rule, but he does not have the right to do so without justice. This was the basis of the English Common Law: *A Christian Manifesto* (1981) pp 27-28. See John CH Wu, *Fountain of Justice: A Study in Natural Law* (1955).

[84] See William Blackstone, Ch 1 *Commentaries on the Laws of* England Vol 1 (1979). For an exposition of the Blackstonian view, see Thio Li-ann, *Constitutional Interpretation: Lost Lessons from the Fundamental Principles of the Constitution,* unpublished LLM thesis, Harvard Law School [on file at the Harvard Law School Library. Alternatively, copies may be obtained from the author who can be contacted via email at <lawtla@leonis.nus.sg>].

and espoused by William Blackstone[84] in the eighteenth century was illustrative of the link between natural law and parliamentary legislation:

> …the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void.[85]

Common law values were thus fundamental and higher than those espoused in statute law. With the advent of the positivist period, the supremacy of law was conflated with the supremacy of Parliament. Hence in England, a Court cannot strike down an Act of Parliament as being unconstitutional since Parliament is supreme and can overturn present statute law through a later Act in time through the doctrine of implied repeal. The control of public power is mainly effected though the political checks a democratic society affords and through administrative law which controls the exercise of government power whether the source be statute-based or rooted in the royal prerogative.

Nevertheless Friedrich notes that the idea that Courts had the right to interpret statutes in accordance with common law heavily influenced early American constitutional jurisprudence

> By combining the Constitution as the fundamental law of the land with the common law, a great deal of common law has been worked into the American legal fabric in the course of a century and a half of judicial "interpretation" of the Constitution.[86]

By elevating the administrative law concept of "natural justice"[87] to a constitutional concept the Privy Council in *Ong* was adopting precisely the above method of interpretation. This opened up new vistas of possibilities in terms of constitutional interpretation, throwing open questions as to whether 'fundamental principles of natural justice' were substantive or procedural limits[88] on the power of the legislature to enact laws which effected

[85] Quoted in Patterson, "The Evolution of Constitutionalism" (1948) 32 Minnesota LR 427-457.

[86] Carl J Friedrich, *Constitutional Government and Development* (1950) at 222.

[87] John F McEldowney, *Public Law* (1994) at 475-484.

[88] See TKK Iyer, "Art 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 Mal LR 213; AJ Harding, "Natural Justice and the Constitution" (1981) 23 Mal LR 226.

the deprivation of life or personal liberty. In the field of administrative law, the Courts did not merely implement the will of Parliament but sometimes supplemented parliamentary will when they found that statutory procedural safeguard fell short of the common law standards. As Byles J declared in *Cooper* v *Wandsworth Board of Works*[89] "the justice of the common law will supply the omission of the legislature."[90] *A fortiori,* this should apply to a constitutional concept of natural justice which should certainly override any statutory attempt to oust natural justice. This would constitute an extension of natural justice towards not only controlling unfair judicial and administrative procedures but unfair legislation as well. This opens the door to the fear of unwarranted judicial activism which would eat into legislative power.

The problem is that standards of natural justice have at their core the underlying idea of 'fairness' and 'fairness' is a word capable of having both substantive and procedural connotations.[91]The elevation of the notion of natural justice or 'fairness' to a constitutional value could be understood to extend beyond requiring the executive in exercising delegated powers to conform to standards of procedural propriety; the legislature too would be duty bound not only to ensure that statutes must contain sufficiently comprehensive procedural safeguards but also that the content of the statute itself must conform to substantive notions of fairness as judicially defined.

E. *Developments Leading up to* Jabar*: The Communitarian & "Local Conditions" Approach*

(i) *Constitutional Interpretation: From Extra-Textualism to Strict Textualism*

The Privy Council in *Haw Tua Taw* v *PP*[92] tried to provide some guidelines in ascertaining whether a particular Act or its provisions violated some 'fundamental principle of natural justice'. The Privy Council shifted to a relativist or evolving conception of 'natural justice'[93] which deviated from

89 [1863] 14 CB (NS) 180.

90 The more comprehensive statutory procedural safeguards, the less willing Courts are to imply in additional procedural safeguards: see *Wiseman* v *Borneman* [1971] AC 297 at 308 and *Furnell* v *Whangerei High Schools Board* [1973] AC 660.

91 Peter Cane, Ch 5 "Natural Justice" in *An Introduction to Administrative Law* (1987); PP Craig, Ch 8 "Natural Justice: Hearings" in *Administrative Law* (3rd ed, 1994).

92 [1981] 2 MLJ 49.

93 "…what may be regarded by lawyers as rules of natural justice change with the times" *Ibid,* note 92, at 53 B-C.

94 Essentially, it was an argument based on historical continuity and the perpetuation of a pre-Independence system of law which incorporated these principles.

Diplock's original justification for importing this concept.[94] Laws which derogated from Article 9(1) were not to be "obviously unfair" though the Privy Council eschewed any attempt to make an exhaustive list of what might violate these fundamental principles, leaving the concept indeterminate and dependent on an incremental, case by case exposition. In ascertaining whether a particular practice offended fairness, "that practice must not be looked at in isolation but in the light of the part it plays in the complete judicial process."[95] In addition, the Court could adopt a broad, non-parochial approach in the assessment of what natural justice required. In considering whether the changes to the law effectively removed the right of silence violated natural justice, reference was made to international human rights documents like the 1948 Universal Declaration of Human Rights and the 1950 European Convention on Human Rights as well as comparative constitutional practices in non common law legal systems.

In the cases that ensued, the guidelines in *Haw* appear to have been largely ignored. In the case of *PP* v *Mazlan* which was concerned with the privilege against self-incrimination, the Court of Appeal summarily dismissed the argument that the failure to inform the accused of his privilege against self incrimination was not a violation of his constitutional rights. The refusal to read this putative right as a right supplementing the Article 9(1) right not to be deprived of personal liberty save in accordance with the law was based on there being no express provision for such a right on the face of the constitution. The Court's preference for strict textualism opposed elevating "an evidential rule to constitutional status" as "such an elevation requires in the interpretation of article 9(1) a degree of adventurous extrapolation which we do not consider justified."[96] The Court was unwilling to deduce that 'fundamental principles of natural justice' included the right to be informed of one's right to silence. Strangely enough, strict textualism gave way to less conservative extra-textualism in the religious liberty case of *Colin Chan* v *PP* when Yong CJ found that there was an unwritten "paramount mandate" to the Constitution:

> 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.[97]

95 *Supra,* note 92, at 53B.
96 *Supra*, note 27, at 516 C-D.
97 [1994] 3 SLR 662 at 684F-G.

Pursuant to this, the Court found that the religious liberty of Jehovah's Witnesses – in the form of their pacifist beliefs which forbade the undertaking of any form of military service – must be subsumed under national service "which is a fundamental tenet in Singapore" and that anything which detracts from this should not and cannot be upheld."[98] Since the performance of mandatory national service was not a constitutional duty, the Court was in effect conflating the legislative policy of national service with a constitutional obligation. The communitarian[99] bent of such reasoning is self-evident.

The wholesale rejection of the right to be told of one's right to silence in *Mazlan* has elicited strong criticism as it neglected the importance of this right in the context of the whole criminal process as advocated by *Haw*. Hor has pointed out that the privilege against self-incrimination consists of discrete rules, finding "alarming" the "complete banishment of the privilege from the constitutional realm" as this "carries with it the danger that many rules will not be taken seriously and of the privilege being removed without the establishment of alternative safeguards to the accused."[100] He further argues:

> Looked at in isolation, the privilege against self incrimination may seem to be a hindrance to police investigation and a generally ineffective way to protect the interests of the accused. But in the light of the complete judicial process, which is still predominantly adversarial, the privilege, since police statements were rendered admissible, has been and still is the basis of much of the remaining law governing police interrogation. Modern justifications of the privilege locate its rationale in the role which it plays in protecting the suspect against the extraction of unreliable and improperly obtained statements. That the accused stands in such danger cannot be denied.[101]

[98] *Ibid,* note 97, at 678B. For a critical treatment of the approach towards constitutional interpretation in *Colin Chan,* see Thio Li-ann, "The Sacred Trumps the Secular: Constitutional Issues Arising from *Colin Chan* v *PP*" [1995] 16 SLR 26 at 77-91.

[99] For readings on 'Communitarianism', see Steven Lukes, "Five Fables about Human Rights" in *On Human Rights: The Oxford Amnesty Lectures 1993,* Shute & Hurley eds at 20-40; Chua Beng Huat, *Communitarian Ideology and Democracy in Singapore* (1995); Daniel Bell, *Communitarianism and its Critics* (1995).

[100] Michael Hor, "The Privilege against Self Incrimination and Fairness to the Accused" [1993] SJLS 35 at 44.

[101] *Ibid*, note 100, at 45.

In balancing individual and community interests, the Court has also seemed to adopt a parochial attitude towards the "sources" it looks at, in particular, international human rights documents.[102] For example, in *Colin Chan*, the learned judge in addressing the contention that the relevant administrative order violated religious freedom which was constitutionally safeguarded as well as being an international human right said: "I think the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone."[103] It is submitted that the fact that an internationally recognised human right is at stake should be given serious consideration in the balancing process.

(ii) *Communitarian Bias: A Selective Sifting of Foreign Cases*

As far as foreign cases are concerned, those which may be used to bolster a 'communitarian' ethos are readily approved of. For example, in *Colin Chan,* the Court approvingly referred to the Australian High Court case of *Adelaide Co of Jehovah's Witnesses Inc* v *Commonwealth*[104] which addressed the constitutionality of the National Security (Subversive Associations) Regulations under which the Adelaide Company of Jehovah's Witnesses was declared a body 'prejudicial to the defence of the Commonwealth and the efficient prosecution of war'. Pursuant to this, the government took possession of the Jehovah's Witnesses premises which potentially clashed with Section 116 of the Constitution which prohibited the making of any law contrary to the free exercise of any religion. The law was upheld but it was promulgated in early 1941 and catered to war time exigencies. By referring to it, the Court in *Colin Chan* seemed to import the notion that the 'under siege' mentality in wartime Australia was appropriate to Singapore in the times of peace. The paramountcy attributed to the need to maintain public order, a precedent condition for the enjoyment of liberty was reflected

[102] In *Haw,* the Privy Council referred to international law and foreign practices in the context of ascertaining the requirements of natural justice. It is submitted that this 'broad' approach should extend to a consideration of balancing all constitutional liberties against legislatively permitted derogations in the community's interests. This would be consonant with the notion that there are certain minimal international standards in the field of human rights which all states as part of the international community are bound to observe; such an approach affords the best protection to an individual who might be subject to the abuses of state power.

[103] *Supra,* note 97, at 682A. See also, Thio, "Secular Trumps the Sacred" [1995] 16 Sing LR 26 at 48-53.

[104] (1943) 67 CLR 116.

[105] Thio Li-ann, "The Secular Trumps the Sacred" (1995) 16 Sing LR 26 at 77-79.

in the broader definition of 'public order' adopted.[105]

(iii) *The Invocation of 'Local Conditions': Raising Reputation, Razing Review?*

Foreign cases have also been rejected as being inappropriate to the "local conditions" of Singapore, that is, inconsistent with the local context and the shared understandings, traditions and customs which bond Singapore's multi-cultural populace. There is nothing objectionable *per se* in developing a constitutional jurisprudence which accords with the collective purposes of Singapore society – which is not to be conflated with the interests of the government of the day – in pursuit of an authochthonous legal system. In distinguishing the reasoning in foreign cases which are always useful models or anti-models, cogent reasons must be offered as the basis for distinction. Thus far, it is submitted that the reasons proffered when "local conditions" are invoked have been wanting[106] or are such as to almost conclusively overwhelm the individual's interests and liberties. The presumptive bias towards community interest, which is an antipodean shift from the presumptive bias in favour of the individual advocated in *Ong Ah Chuan* is clearly manifested where public reputation is concerned, with judicial tests placing tightly monitored limits to political speech critical of public officials or institutions.

This is clearly illustrated in the development of the common law offence of contempt in Singapore. This offence is one of the eight qualifications to the Article 14 constitutional guarantee of free speech. In *Attorney General*

[106] For example, in *Colin Chan* v *PP* [1994] 3 SLR 662. the learned judge refused to look at cases litigated under the American First Amendment on the following basis at 681F-H: "The American provision consists of an 'establishment clause' which proscribes any reference for a particular religion and a 'free exercise' clause which is based on the principle of governmental non-interference with religion. Significantly, the Singapore Constitution does not prohibit the 'establishment' of any religion. The social conditions in Singapore are, of course, markedly different from those in the United States. On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context." It would have been preferable, in the interests of developing local constitutional jurisprudence if the learned judge had articulated the relevant factors distinguishing American and Singapore society. Furthermore, while American jurisprudence under the 'Establishment' clause may not be relevant in the light of our Art 15(2) and Art 152, there is no reason why recourse cannot be had to the jurisprudence under the 'free exercise' clause to consider the factors American judges weigh in drawing the line between permissible and impermissible government regulation of religious matters: see Terry Eastland, *Religious Liberty in the Supreme Court: The Cases that Define the Debate over Church and State* (1993).

[107] [1991] 2 MLJ 531.

v *Wain*[107] the learned judge rejected Canadian cases, even refusing to consider the rationale underlying the balancing processes there undertaken between free speech interests (which have both an individual and community dimension) and the interest in continued public confidence in the judicial institution in the administration of justice. Before the Court can cite a speaker for contempt, the Canadian test is that, *inter alia,* a degree of malice[108] must be imputed to the speaker and that the effect of such speech must create a real and substantial danger to judicial reputation.[109] The focus here is upon the 'local condition' upon which the judgment turned. This may be discerned from the following paragraph:

> To my mind, the conditions local to Singapore are many and varied. I am not going to touch on the socio-political and economic conditions of our island nation which is markedly different from many other countries. For the present purpose, what I want to stress is that in so far as the judiciary is concerned, unlike in the United Kingdom and the United States, and a number of other Commonwealth countries where there are jury trials and the jury are the judges of fact, the administration of justice in Singapore is wholly in the hands of judges and other judicial officers. So, this condition must weigh heavily in the application of the law of contempt in Singapore...because judges in Singapore are judges of facts, the contempt of scandalising the court by imputing bias to a judge, or attacking his impartiality, his propriety and integrity in the exercise of his judicial functions, must be firmly dealt with...such accusations are harmful to public interest[110]

Clearly setting out these distinguishing conditions would facilitate the development of a cogent, local jurisprudence. Though no two countries are the same, a broad spectrum of countries subscribe to the same set of ideals, principles and methods of organising government: this would include the idea of constitutional government, representative democracy, checks and

[108] That malice was irrelevant in a finding for contempt in Singapore was affirmed in *AG* v *Lingle* [1995] 1 SLR 696 where an "objective" test based on the effects of the words. For an analysis of this case, see Thio Li-ann, *Asia Pacific Constitutional Yearbook*: Country Report Singapore 1995 [forthcoming, Centre for Comparative Constitutional Studies, University of Melborne].

[109] For a more detailed critique of *Wain,* see Hor & Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore," (1991) 12 Sing LR 296 at 305-311.

[110] *Supra,* note 107, at 531 H-I to 532 A-C.

balances and accountability to the governed. Glib comparisons between countries with differing "socio-political and economic conditions" should not be made but it would be equally facile to assume that there is no point of commonality, particularly in an increasingly interdependent world. Singapore, like the United States and United Kingdom and many Commonwealth countries, is a member of the United Nations. All these countries in principle (though not perhaps actuality) may be said to subscribe to such a universal set of ideals as those found in the 1948 Universal Declaration of Human Rights[111] which is accepted as universally binding customary international law as well as the principles in the Charter itself.

The foreign cases cited before the Court in *Wain* were decided in the context of jury trials. This is a clear departure from local practice and on this basis, the learned judge in *Wain* refused to consider the reasonings of these foreign cases. However, was the difference a palpable and significant one? The reasoning of the learned judge seems to be that since local judges shoulder a greater responsibility as both triers of law and fact, they require greater protection from critical speech since such criticism would proportionately have a more damning impact on judicial reputation. But this argument can easily be turned on its head. Since local judges wield more responsibility in Singapore, there is a greater *possibility* of maladminstration and abuse and hence, a greater degree of accountability is called for.

Judges being men and not demi-gods are fallible. They are not subject to the checks operational on elected officials and other than the draconian removal procedure contained in Article 98 of the Constitution, the only check attendant on the judge is that of public censure, whether by citizens or the press. Only in legal systems which espouse a 'feudal' mentality is reputation demanded rather than merited. The latter is the best foundation for legitimacy and merit is earned through an honest and open discussion of public issues which includes judicial performance within its ambit. Furthermore, 'demanded' reputation is entirely inconsonant with the democratic ethos of accountable and transparent government. When it comes to censure of public reputation, it is not the mere fact that the critical speech was made that counts: truth also, is important and people of good faith should be given enough space to make such criticisms without being 'chilled' by the prospect of being cited for contempt. The offence of contempt of court must develop to take this into account.[112] It is regrettable that the

[111] Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" [1995/96] 25 Georgia J of Int'l & Comp L 287.
[112] See Eric Barendt, "Free Speech and the Judicial Process" in *Freedom of Speech* (1996).
[113] (1987) 39 CCC (3d) 1.

learned judge in *Wain* omitted to take into account the reasoning of the Canadian Court in *R* v *Kopyto*[113] where the judicial confidence in its own strength in withstanding public criticism and in the public's ability to discern truth from falsehood was evident.[114] To deny the applicability of this reasoning in the local system would be to suggest that the Singapore public is an undiscerning lot and that judicial reputation rests on tenuous foundations! A local constitutional jurisprudence is desirable in an independent nation but "local"[115] conditions must be clearly articulated and elaborated upon so that their cogency may be tented to the quick.

This same paramountcy accorded to public reputation is also endemic to the case law concerning the law of defamation and the reputation of public officials. In the leading case of *JB Jeyeretnam* v *Lee Kuan Yew*[116] the Court of Appeal rejected the idea of the 'public figure'[117] exception: the idea that a public official ought to bear a higher level of criticism and scrutiny by dint of being, as it were, 'public property' which is a position one accepts voluntarily when stepping into public office. This is related to the democratic rationale undergirding free speech whereby it is considered

[114] Houlden J stated: "The Canadian judiciary and the courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be. As well the Canadian citizenry are not so gullible that they will lose faith and confidence in the Canadian judicial system because of such criticism." *Ibid,* at 4. Dubon J added that "it gives too much dignity to the accused's statement to categorise it as one which would seriously threaten the administration of justice." *Ibid,* at 5.

[115] The inconsistency of the learned judge's approach to constitutional issues is evident when juxtaposed with another of his decisions: *Abdul Wahab bin Sulaiman* v *Commandant, Tanglin Detention Barracks* [1985] 1 MLJ 418. Whereas "local conditions" were stressed in *Wain,* the learned judge seemed to ignore the most 'local' of 'local conditions' in *Abdul Wahab*: the Constitution itself and more particularly, Part VIII which is entitled 'The Judiciary' when considering the constitutionality of a military court. The judge focused on local legislation and foreign case law and practice in coming to his conclusion but omitted to consider the Constitution. For a case comment, see Wilson Wong, (1986) 7 Sing LR 60 and Leong & Samosir, "Forever Immune?" (1986) 28 Mal LR 303.

[116] [1992] 2 SLR 310. See also Michael Hor, "The Freedom of Speech and Defamation" (1992) SJLS 543.

[117] See *Gertz* v *Robert Welch* 418 US 323 (1974) Powell J pointed out "We have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim is self-help... Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater...there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek government office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties."

important that the people have a right to know who their governors are and to be able to discuss their performance in discharging their public office freely, even robustly. The Court of Appeal in rejecting the actual malice test from *New York Times* v *Sullivan*[118] and the view that the acceptable limits of criticism were wide for politicians than private individuals in *Lingens* v *Austria*[119] stated:

> Persons holding public office or politicians are equally entitled to have their reputations protected as those of any other persons. Such person, in the discharge of their official duties, are laying themselves open to public scrutiny both in respect of their deeds and words ... criticisms or attacks must, in our opinion, respect the bounds set by the law of defamation and we do not accept that the publication of false and defamatory allegation, even in the absence of actual malice on the part of the publisher, should be allowed to pass with impunity. The law of defamation protects the public reputation of public men as well.[120]

Certainly, the law must balance the risk of falsehood between the speaker and the public man who is the object of such speech. The latter does not have any less interest in protecting his reputation than an individual in private life but this interest contends with the speaker's right to speak as well as the hearer's right to receive such information, particularly important in the context of a democratic society. Striking the balance wrongly could have the consequences of 'chilling' what could be very valuable speech or of not affording sufficient protection to the reputation of a public man. Just as the public has an interest in the maintenance of public character, so too it has an interest in the ventilation of public grievances which could include criticism of a public official on matters bearing on the discharge of the functions of public office.

The Court referred to two Pre-Canadian Charter[121] cases and approvingly cited a passage from *Gatley on Libel and Slander* as forming part of the rationale for rejecting the 'public figure' exception

> It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking pubic positions of trust

[118] (1964) 376 US 254.
[119] (1986) EHRR 407.
[120] *Supra,* note 116, at 332H-I and 333A.
[121] *Campbell* v *Spottiswoode* (1863) 32 LJ QB 185 and *Tucker* v *Douglas* [1950] 2 DLR 827.
[122] *Supra*, note 116, at 333H-I.

> and responsibility, and leave them open to others who have no respect for their reputation.[122]

Rather than expecting politicians to be 'thicker skinned', politicians are to be treated as honourable and sensitive men. This is certainly consonant with the government's concept of "shared values" in Singapore where it has declared:

> The concept of good government by honourable men (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population fits us better than the Western idea that a government should be given as limited powers as possible and should always be treated with suspicion unless proven otherwise.[123]

Culture, as defined by the government, could then be a basis for distinguishing foreign cases where the ethos of 'rugged individualism' holds sway. In the first place, it would seem that 'Western' courts and commentators have in times past and present espoused the concept of the 'honourable' public official insofar as public reputation is concerned. This is a recognition of the importance of the maintenance of public character. However, to focus exclusively on the latter would present a lopsided and inaccurate view as it does not contemplate the possibility of a less angelic government of dishonourable men which is a contingency that the law must provide for. In commenting upon the Court of Appeal's citing of the above passage, Hor has noted:

> This rather bleak picture of would-be politicians and holders of public office scurrying away from the light of adverse publicity is a startling indictment of our "honourable men". One would have thought that they would be made of sterner stuff .... if less honourable men gain public office, the public may never know their true colours without a firm protection of speech concerning public affairs.[124]

In the worst case scenario, a law of defamation which does not give due credit to the democratic rationale behind free speech which criticises public officials opens the door towards an inappropriate degree of self-censorship which could lead to the perpetuation of a deception on the public.

123 Paragraph 41, Shared Values White Paper, Cmd 1 of 1991 (Ordered by Parliament to lie upon the Table).

124 Michael Hor, "The Freedom of Speech and Defamation", [1992] SJLS 542 at 555.

One cannot assume that a governor is honourable; he or she must be known and believed to be honourable and a free discussion of a public man's personality and performance in discharging his public office can facilitate this, with the proviso that the law ensures adequate protection against malicious statements which are false and ill-founded. In the context of defamation law, the communitarian interest in the maintenance of public character has to be balanced against both the communitarian and individual interest in speech critical of public officials, bearing in mind that modern democracy calls for transparent and accountable government.[125]

IV. The Impact of Jabar on Constitutional Interpretation

The 1995 case of *Jabar* v *PP* is the latest significant case which illustrates the current approach adopted *vis-à-vis* constitutional interpretation.

A. *Facts and Issues*

The relevant facts are as follows: on 11 May 1989, the High Court convicted the appellant and two others for murder committed while being part of an unlawful assembly under sections 149 and 302 of the Penal Code. They received the death sentence and the Court of Criminal Appeal dismissed their appeals against conviction. The day before the scheduled date of execution on 11 November 1994, the appellant filed for a stay of the execution of the death sentence, asking for a declaration that to carry out the death sentence after a prolonged period of 5 years imprisonment would be unconstitutional and therefore unlawful. Hence, an attempt was made to argue that the "death row phenomenon" constituted a violation of the appellant's constitutional rights under Article 9(1) of the Constitution: "No person shall be deprived of his life or personal liberty save in accordance with the law."

Specifically, the argument rests on the idea that the lapse of a certain period of time subsequent to conviction resulting in a period of prolonged imprisonment on death row would constitute "cruel and unusual punishment." Unlike, for example Article VIII[126] of the United States Constitution, there is no express provision in the Singapore Constitution which

[125] For developments in the common law (apart from the influence of the European Convention on Human Rights), see *Derbyshire County Council* v *Times Newspapers Ltd* [1993] 2 WLR 449 where a quasi constitutional value was given free speech. For an incisive comment, see Eric Barendt, "Libel and Freedom of Speech in English Law" (1993) Public Law 449.

[126] Art VIII reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

confers upon a citizen a right not to be subject cruel and unusual punishment. Therefore, the argument asserts that the "death row phenomenon" would contradict the constitutional prohibition not to be deprived of life save in accordance with the *law*. "Law" did not simply mean *lex* (the enacted law) but in its most august conception encompassed standards of *jus* or *recht* (*justice* or *right*). In the present context, 'law' was argued to include substantive notions of humanity insofar as the 'vitiating' factor of the death row phenomenon was said to render the deprivation of life in such conditions illegal. Such an argument would place law squarely within a normative context.

B. *The 'Death Row Phenomenon' as a Human Right Violation*

In relatively recent years, cases from foreign jurisdictions have recognised that prisoners who have been condemned to death by a court of law have a right not to be exposed to the "death row phenomenon" which is the prolonged period of waiting between the judgment and the execution of the death sentence. This is because the phenomenon is considered to constitute "inhuman and degrading" punishment. This is attributable to the mounting mental anguish attendant on death row inmates.

The European Court of Human Rights considered this issue in relation to Article 3 of the European Convention of Human Rights in the *Soering*[127]case. This case involved the pending extradition of one Soering, a German national, who was alleged to have killed the parents of his girlfriend when he was eighteen in Virginia, USA. He was subsequently arrested in England and the US prosecutor sought his extradition to the United States. If convicted in Virginia which had the death penalty for murder, there was a clear likelihood that Soering might be subject to the death penalty and the "death row phenomenon" as it was usual that a death row inmate would have to a six to eight year wait before he became a dead man walking. Article 3 of the European Convention would raise an issue since to expel an alien from a territory to another one where he would be liable to suffer inhumane treatment might involve the expelling country in a human rights violation for which international responsibility would

[127] European Court of Human rights, (1989) 11 EHRR 439. See Jacobs & White, *The European Convention on Human Rights*, (2nd ed, 1996) at 62.

[128] See also Art 5(2) of the 1969 American Convention on Human Rights (Pact of San Jose, Costa Rica); Art 5 of the African Charter on Human and Peoples' Rights (1981). Interestingly the Kuala Lumpur Declaration on Human Rights which was approved by the Second Plenary Session of the 14th General Assembly of the ASEAN Inter-Parliamentary Organisation, October 1993 provides simply in Art 7: "Everyone has the right to life. No one shall be deprived of such right except in accordance with the law."

be incurred. Article 3 of the European Convention, which reiterates Article 5 of the 1948 Universal Declaration of Human Rights (which is universally binding as customary international law)[128] reads: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Whether a particular kind of treatment would constitute "inhumane" treatment for Convention purposes would depend on a fair balancing on a consideration of all the circumstances of a case. The Court seem to be influenced by three main factors indicated in the portion of the judgment extracted below:

> having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consequence of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.[129]

The three factors would appear to be the long duration prior to the execution of a death sentence, that Soering was only eighteen at the time of committing the killings and that there existed the possibility that Soering, on the basis of the nationality head of jurisdiction, could be extradited and tried in Germany instead. Unlike Germany, America was not a party to the European Convention. Since there was an alternative means of ensuring justice (trying Soering in Germany), Soering, who was alleged to have committed a serious criminal offence, could not escape with impunity. On the basis of these and other factors include conditions at the American correctional centre where the possibility of Soering becoming a victim of violence and sexual abuse was a real risk, the Court decided that the threshold of suffering Soering would face if extradited to the US would exceed what Article 3 allowed. Hence, the Court decided that the Secretary of State's decision to extradite Soering to the US would breach Article 3.

C. *The Decision in* Jabar

The Court of Appeal in *Jabar* considered the approaches adopting in two

[129] Para 111 of the judgment, *supra,* note 124.

Privy Council cases from Jamaica and several from the Indian jurisdiction pertaining to the dehumanising effect of the "death row phenomenon" and whether this violated a constitutional liberty.

The constitutional issue before the Privy Council in *R* v *Pratt*[130] and *Riley* v *AG of Jamaica*[131] was whether the carrying out after prolonged delay of a death sentence which had been lawfully passed by a court of competent jurisdiction can be a contravention of the convicted man's constitutional rights. What was being challenged was not the judicial imposition of the death penalty[132] but the manner in which the executive would implement the sentence after a certain time had passed.

Article 17 of the Jamaican Constitution reads:

> "(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

The Privy Council in the later case of *Pratt* rejected the ruling of the majority in *Riley* where it held that since at the time just before the Constitution came into effect the execution of the death sentence would constitute a punishment of a description which was lawful notwithstanding any delay between the passing of the sentence and the issue of the warrrant for execution, executing the death penalty would be "to the extent" that the law within the meaning of Article 17(2) of the Constitution would authorise. Their Lordships in *Pratt* found that Article 17(2) did not relate to the question of delay in carrying out sentence but just to authorising the passing of a judicial sentence of a description of punishment lawful in pre Independence Jamaica. They ruled that countries retaining capital punishment had to carry out sentence expeditiously. On principle, they held that a prolonged delay between sentencing and execution could constitute inhuman and degrading treatment contrary to Article 17 of the Jamaican

130 [1993] 4 All ER 769.

131 [1983] AC 719.

132 It is a matter for the legislature of any country to decide whether or not to have the death penalty and the type of offences it should be applicable to: see Lord Diplock's judgment in *Ong Ah Chuan* v *PP* [1980] 1 MLJ 64 at 72D-G and F-I.

constitution regardless of whether the cause of delay was the fault of the state or legitimate resort of the accused to all available appellant procedure. However, if the cause of the delay was entirely the accused's fault, *eg,* escape from custody, frivolously[133] pursuing legal procedures, he would not be able to reap the benefits of this sort of behaviour by arguing that the delay he had caused would then render the execution of the death sentence unconstitutional. The Privy Council stated that in ascertaining whether a certain passage of time was inordinate, there was a presumption that a delay beyond a 5 year period would provide "strong grounds" for believing that the delay constituted "inhuman and degrading" treatment. The accused in *Pratt* itself was on death row for some fourteen years which was not considered to be a borderline case, with their Lordships finding the total period of delay "shocking," being twice what the European Court of Human Rights would consider an infringement of Article 3 of the European Convention of Human Rights, besides clearly violating Article 17(1) of the Jamaican constitution.

Lord Griffiths in delivering the unanimous opinion of the Privy Council in *Pratt* expressed preference for the dissenting views enunciated by Lord Scarman and Lord Brightman in *Riley* who bluntly stated:

> …the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading.[134]

In considering the criterion for determining when a punishment is inhuman or degrading, Lord Scarman and Lord Brightman tried to articulate factors which would provide guidance in ascertaining when a time will come when the delay would be intolerable and it would become wrong in law to carry out the sentence. They stated that the criterion was "the effect of the delay in all circumstances upon those subjected to it."[135] They rejected the submission that the test should be the reasonableness of the decision to delay the execution as being "too austere because it fails to give priority to the suffering of the victim in the interpretation of the terms

[133] In *Pratt,* their Lordships held that petitions to two international human rights bodies – the Inter American Court and the United Nations Human Rights Committee did not constitute the initiation of 'frivolous' time wasting proceedings.

[134] *Supra,* note 130, at 734H-735A.

[135] *Supra,* note 130, at 735H.

"inhuman" and "degrading". Two factors were considered central: whether or not the prolonged delay arose from factors beyond the control of the accused and whether the inordinate delay was such as to cause such acute suffering as to render the death penalty (*per se* a legal judicial sentence) inhuman and degrading in these circumstances.[136] Hence, *Pratt* approached the matter not by laying down an absolute rule but by adopting a balancing of factors approach.

Lord Griffiths in *Pratt* located the rationale for this ruling in a self-evident proposition that there was an "instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be in our humanity."[137]

It must be noted that unlike the Jamaican Constitution, the Singapore constitution contains no express textual provision on prohibitions against inhuman and degrading treatment. The Court in Singapore would have to deduce or infer such a prohibition from the concept of 'law'. This deductive approach is precisely that adopted by certain cases from the Indian jurisdiction. By and large, the cases affirmed the approach adopted by Lord Scarman and Lord Brightman in *Riley* although it was stated that the dehumanising character of prolonged delays did not turn on whether the accused or the state was responsible for the delay.

The Indian Supreme Court in *Sher Singh* v *State of Punjab*[138] disagreed with the formulaic approach in the earlier case of *Vatheeswaran* v *State of Tamil Nadu*[139] where the Court stipulated that the passage of two years constituted inhuman and degrading treatment. It rejected the laying down of hard and fast rules.[140] As a matter of principle, both cases accepted in principle that supervening events post the imposition of a death sentence resulting in a prolonged delay in its execution would make the latter harsh, unjust and unfair, contrary to Article 21 of the Indian Constitution:

> No person shall be deprived of his life or personal liberty except according to *procedure* established by law. [italics mine]

[136] *Supra,* note 130, at 736B-C.
[137] *Supra,* note 130, at 783G-H.
[138] [1983] 2 SCR 582.
[139] [1983] 2 SCR 348.
[140] See also the approach adopted in *Smt Triveniben* v *State of Gujerat* [1989] 1 SCR 509 where the Court rejected the two year benchmark and argued that inordinate delay *per se* did not render the execution unconstitutional. What had also to be taken into account was the dastardly nature of the crime, whether the State was guilty of dilatory conduct and whether there were good reasons or none for the delay.

This provision was found to be *in pari materia* with Singapore's Article 9 by the High Court judge in *Jabar* though the word "law" in Article 9 is potentially of broader procedural *and* substantive import than the word "procedure" in Article 21 of the Indian Constitution. The broad and bold approach to interpreting Article 21 entails a venture into the realms of extra-textualism and constitutional philosophy to vindicate the perceived end of a constitutional provision. As Chinnappa Reddy J stated

> The fiat of Article 21 … is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable [which] implies a right to free legal service where he cannot avail them … a right to a speedy trial … humane conditions of detention preventive or punitive … It seems to us but a short step…to hold that prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death.[141]

Under this approach, the legislature would be constrained to provide procedure in such Acts of a certain standard and quality of justness, fairness and reasonableness. This active role of watchdog over human rights is even more clearly expressed by Chandrachud CJ in *Sher Singh* v *State of Punjab*

> The horizons of Article 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation … Article 21 stands like a sentinel over human misery, degradation and oppression. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all states – the trial, the sentence, the incarceration and finally, the execution of the sentence.[142]

This is indicative of a robust, active approach whereby the Court has an active agenda to do what it can in the war against human oppression and degradation. 'Procedure' is hence a fertile source for fuelling the articulation of extra-textual rights which vindicates the end of human dignity through a deductive, case by case approach.

[141] *Supra,* note 139, at 359.
[142] *Supra,* note 138, at 593.

The Court in *Jabar* distinguished the Indian authorities on the basis that in contradistinction with the Singapore position, death sentences under the Indian Penal Code were not mandatory but discretionary. In India, life imprisonment was the general rule with the death sentence being the exception for which special reasons were required. Hence the power of the Indian courts to 'commute' a death sentence lay in the fact that the death penalty was an alternative sentence.

The Court of Appeal agreed with the distinction drawn by the Deputy Public Prosecutor that Article 21's 'except according to procedure established by law' differed materially from Article 9's "in accordance with the law." The former was construed to have broader effect in terms of giving the Court the jurisdiction to ensure that the entire process of depriving someone of life or liberty extended to all stages: during, before and after the trial and sentencing. This was because the reading of Article 21 by the Court in *Maneka Gandhi* v *Union of India* affirmed that fundamental liberties in the Indian Constitution flowed together into a great stream of justice, and hence, there was necessarily some overlap with other liberties. Hence, there was a confluence or linking between the streams of personal liberty in Article 21 and equality in Article 14. Consequently, 'procedure' in Article 21 had to be fair, just and reasonable and not fanciful, oppressive or arbitrary. On this basis it was argued by the DPP that Article 21 provided not only for the legality of the death sentence but extended to the procedure for its execution. The linkage to the norm of equality meant that all accused must be treated similarly at all stages prior to and post the trial process. Contrariwise, Article 9 was narrow in reach and only pertained to the legality of imposing the death sentence. Subsequent stages are beyond the ken of the Court - the issue of prolonged delay as constituting 'cruel and inhuman treatment' could not even arise before a Court. If all the stipulations laid out in the piece of legislation derogating from Article 9 rights were followed, the matter was concluded.[143] The DPP argued that one could 'trust' the

[143] "Once the sentence is passed and the judicial process is concluded, the jurisdiction of the court ends. Once the Court of Appeal has disposed of the appeal against conviction and has confirmed the sentence of death, it is functus officio as far as the execution of the sentence is concerned. It does not have the power to order that the sentence of death be stayed or commuted to a sentence of life imprisonment, especially when the appellant was convicted of an offence which carried a mandatory sentence of death." [1995] 1 SLR 617 at 631I to 632A. Commuting a sentence lay in the hands of the President acting on the Cabinet's Advice and was not a judicial function. It was for the President to decide whether or not a delay was good enough reason for commuting a sentence.

executive in the manner in which it handled the execution process since such draconian power as that of detention was vested in the highest authority of the land – a minister accountable to Parliament – and not "mere officials" as in the case of India. Presumably, this means that Indian "mere officials"[144] needed to be held accountable to the watchful eye of the judiciary as they were obviously not as 'trustworthy' as top executive officials. However, this statement of faith in the "highest authority in the land" does not allay the fear of constitutional lawyers about the potential abuse of wide powers, subject to no external means of accountability or supervision – an exception to the rule of law.

The Court in *Jabar* agreed with the DPP's argument that Article 9(1) ["law"] differed from Article 21 ["procedure"]. The fact that an alternative way of reading Article 9(1) was open to the Court just goes to show the crucial role the ideology a judge subscribes to plays in the process of constitutional interpretation. There is no neutrality in this respect. One way gives substance or 'life' to constitutional lists of rights and the other, 'death' – the letter kills, the spirit gives life.

Quite a different result could have been reached had the Court in *Jabar* linked the idea of 'law' in Article 9 with that of fundamental principles of natural justice or fairness which could arguably import in a norm of equality since this is a substantial aspect of 'fairness'. Had this purposive approach been adopted, and it was open to the Court so to do since *Ong Ah Chuan* put a foot in the door to such an approach, the prolonged delay would be a justiciable matter and through deducing supporting rights from Article 9, the rights of the criminal accused and convicted could have been strengthened. However, this approach would eschewed and instead, the ghost of *Arumugam* seems to have been resurrected whereby "law" is simply the will of the legislature enacted in due form. Consider this crucial passage:

> 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.[145]

[144] This is borne out by the passage which the DPP in *Jabar* quoted from the preventive detention Malaysian case of *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 at 150: "Our law is quite different from that of India. First … the power of detention is here given to the highest authority in the land, acting of the advice of the minister responsible to and accountable in Parliament, not to mere officials. Secondly … here detention, in order to be lawful, must be in accordance with the law, not as in India where it must be in accordance with *procedure* established."

[145] *Supra*, note 5, at 631B.

The Court will ignore the fact that a law to deprive a person of life or personal liberty is unfair, unjust and unreasonable, so long as Parliament passes it. This reposes a great deal of trust that Parliament will be constrained by the political check of public opinion. In the worst case scenario, this literalist approach suggests that a law which provides for death by burning at the stake or the ancient Roman practice of crucifixion would not be struck down by a Court if validly passed.

Such a deferential posture *vis-à-vis* the legislature defeats the whole purpose of having a constitutional guarantee of rights. It is an approach perhaps more suited to countries like England where Parliament is supreme. One cannot say, at least theoretically, that the Singapore Parliament stands on an equal footing as the British one as this would make a nonsense of the doctrine of constitutional supremacy and the notion that Parliament is a creature of the Constitution and thereby limited by terms on the basis of which legislative power is vested. The limits of such power is adjudicated by what Alexander Hamilton called the weakest branch of the government *sans* sword or purse, the judiciary. In speaking about the role of the Malaysian judiciary in the context of a written constitution, Lord Diplock has pointed out that not only does the judiciary control the executive through administrative law,

> in Malaysia, judicial control of the government receives a new dimension – it extends to the legislative branch of government … its power to make laws is not absolute; it is subject to restrictions which, if exceeded, render a law that it was purported to pass *ultra vires* and consequently void; and it is the function of the judicial branch of government to declare it and so to decline to enforce it. This imposes upon the judiciary of Malaysia an even greater responsibility than that borne by the judiciary of England in the field of public law.[146]

It is therefore 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."[147]

By dint of reasoning, these sentiments are equally applicable in Singapore

[146] Lord Diplock, *supra,* note 26, at cxlvi.

[147] *Ibid.* note 146.

[148] As declared by Ong CJ in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 at 141H, "…English courts take a more realistic view of things, while Indian judges for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive power."

where we have a written constitution which places a limit on legislative power. Nevertheless, in Malaysia as in Singapore, there seems to be a preference for the English sensibility[148] in constitutional adjudication as evinced by the general reluctance to review the substantive content of a piece of legislation. Often, this approach is favoured over considering precedents from foreign jurisdiction such as that of India whose constitution to a significant extent formed the model on which the Malaysian constitution was based. Singapore's Constitution traces its genetic roots back to the latter. The rejection of the broad construction of India's Article 21 to include a series of related but unenumerated rights is evident in *Jabar* itself.[149] Another instance where both Malaysian[150] and Singaporean[151] courts rejected the influence of Indian jurisprudence was evident in the rejection of the Indian basic features[152] doctrine. [153]

While accepting that condemned prisoners on death row should not have to endure a prolonged period of imprisonment pending sentence on moral or humanitarian grounds, the Court of Appeal declined to adopt the approach in *Pratt*. The mental anguish suffered when awaiting execution was simply an inevitable consequence which did not in itself infringe any of the prisoner's constitutional rights. This was the view of the United States Court of Appeals in *Richmond* v *Lewis*[154] which the Singapore court adopted. O'Scannlain J in *Richmond* pointed out that if one allowed prolonged delay to constitute 'inhuman and degrading' treatment such that the death sentence is quashed, this would open the door to abuse as "death row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold of time, while other death row inmates – less successful in their attempts to delay – would be forced to face their systems." This would add an element of caprice, arbitrariness and unfairness to the system since it could result in people similarly situated (death row inmates) receiving differential treatment contrary to the equal protection clause in the constitution – this too would be a mockery of justice "if the delay incurred

[149] See also the Malaysian case of *Che Ani Itam* v *PP* [1984] 1 MLJ 113 where the Malaysian Federal Court rejected the argument that the Malaysia personal liberty clause found in Art 5 incorporated the Indian 'due process' idea.

[150] *Phang Chin Hock* v *PP* [1980] 1 MLJ 70; *Loh Kooi Choon* v *Government of Malaysia* [1977] 2 MLJ 187.

[151] *Teo Soh Lung* v *Minister of Home Affairs* [1989] 2 MLJ 449; *Vincent Cheng* v *Minister of Home Affairs* [1990] 1 MLJ 449.

[152] *Kesavananda Bharati* v *The State of Kerala* AIR 1973 SC 1461.

[153] [1969] 2 MLJ 129 at 141H.

[154] 948 F 2d 147.

[155] *Ibid.*

during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."[155] At any rate, once the judicial process concluded with the confirmation of the sentence and so events subsequent to this fell outside the Court's jurisdiction.

A prisoner on death row is not without redress: he can always appeal to the President for clemency and the prolonged period of waiting on death row is a factor the President acting on the advice of the Cabinet *may* take into account in a decision to commute a sentence. But no legal principle exists in this regard.

V. Conclusion: Taking the Constitution Seriously

On the face of the written law in *Jabar*, there was no clear solution whether the putative implicit right not to be subject to cruel and inhuman treatment was in fact a constitutional right. This illustrates how formal legal rules are unable to meet every contingency and

> In novel situations, [the judge] has to reach out into the heart of legal darkness where the flames of precedent fade and flicker, and extract from there some raw materials with which to fashion a signpost to guide the law. When rules run out … the judge has to rely on non-rule standards, principles, doctrines … to assist the decision [which are] an integral part of the seamless web that constitutes the law and the judges are entitled to take the whole matrix of the law in arriving at their decision. Also, when the declared law leads to unjust results or raises issues of public policy or public interest, judges around the world try to find ways of adding moral colours or public policy shades to the legal canvass.[156]

As a concept, the Constitution is not a neutral, antiseptic document. It is a foundational, value-laden document which structures government and the relationship between state and the individual. These values flow from the many streams that feed the doctrine called constitutional law whose *raison d'être* is that of promoting the gospel of constitutionalism: limited but not necessarily anaemic government. It falls to the judiciary to articulate

[156] Shad Faruqi, "Asian Legal Traditions in Relation to Judges: An Overview of Constitutional Adjudication in Malaysia," a paper delivered at the AIDCOM Regional Seminar on "Media and the Role of an Independent Judiciary" on 27-28 August 1996, Bangkok, Thailand at 15-16.

these constitutional standards, principles, presumption and values which inhere in the constitution against the backdrop of a democratic, secular society. The Court is the authoritative interpreter of the Constitution's meaning and can in the adjudicatory process appeal to the values of law, constitutionalism, justice, settled and accepted precedent, fundamental and common religious and ethical values and the dangers of destabilising the political order. Such a holistic view of law in its grand concept requires a purposive and non-literalist approach. A literalist approach denudes the law which is the only thing that can tame power.

This judicial role gains and maintains legitimacy through a prudent use of the Court's interpretive powers but this must rest on the bedrock of a cultural belief that fundamental law is to be obeyed – society must have a consciousness of the constitution and its function, a kind of political faith in constitutionalism for the efficacy and legitimacy of judicial review to take root.

In the course of constitutional adjudication, a judge might well make law but should not be squeamish about this since this part of its role as a guardian of the written constitution and as countermajoritarian check in the scheme of checks and balances.Upon assuming office, a judge swears an oath to "preserve, protect and defend" the Singapore constitution. This is essentially a negative power. On fears that such an approach will entail a judicial usurpation of the legislative function, it is submitted that this fear is overstated. Local judges are uniformly conservative and have shown great self-restraint – any temptation to don the robes of a Platonic guardian is remote. Furthermore, judicial review is essentially reactive, serving to preserve and vindicate existing, agreed upon values and to check the popular will:

> …the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them … the judiciary has no influence over either sword or purse; no direction either of the strength or the wealth of the society; and can take no active action whatever. It may truly be said to have neither force nor will, but merely judgment and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[157]

If the judiciary fails or is ousted in its role as guardian of a citizen's

[157] Alexander Hamilton, *The Federalist No 78* Wesleyan University Press (1961), Jacob Cooke ed.

fundamental liberties which are rights asserted against the state, such liberties are then unhappily emasculated. There is no other effective champion of individual rights and the political check of the ballot box, being periodic, cannot supervise the exercise of government power in between elections. For the maxim *ubi jus ibi remedium* (where there is a right, there is a remedy) to be vindicated, there must be effective mechanisms of review and remedies to secure and enforce declaration of rights. Protecting the latter is a principal purpose of the Constitution. A right which cannot be enforced is worth little more than the piece of paper on which it is inked. Dicey rather smugly noted that common law rights in England had more value sometimes than constitutional declaration of rights, making the cogent point that rights must be supported by the political and legal culture as well as remedial institutions when violations occur:

> ..where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where ... the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.[158]

For constitutional liberties to take root and be meaningful rather than formal, a condition precedent is that these liberties must be something that their recipients do hold dear and watch over with vigilance. Apathy is the quickest way to facilitate the erosion of freedom as it is the lifeblood of an authoritarian society and a culture of control. One cannot just import in a non-indigenous institution like the constitution, the trichotomy of powers and judicial review and expect it to work well if there is no supporting constitutional culture[159] which pervades the governors, the judges and the citizenry. In protecting the constitution, the judiciary must protect and promote the constitutional culture that makes constitutionalism a reality, to fulfill its role of protecting individuals from the potentially despotic will of government institutions. To do so will be no mean task. Constitutional interpretation, like deep root canal work, probes deeply into very basic questions: what is the source of law, how is it validated, what are its functions? Elementally, what kind of society do we want? The crux of this inquiry concerns the centrality of man: is the state his servant or is he himself in

[158] Dicey, *An Introduction to the Study of the Law of the Constitution* (1982) at 201.

[159] For an interesting work on constitutional cultures in the American context, see Robert F Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (1989).

servitude to this metaphysical entity? Should we take a 'low' view of man and view him as the facilitator of an end or a 'high' view of man which sees man as an end in himself?

In a democracy, the function of a government is to maintain and to secure the personality, dignity and creative capacity of the individual and this entails the safeguarding of both the traditional civil-political as well as socio-economic rights. There is little dignity in abject poverty. A healthy economy facilitates and is symbiotic with the development of individual personality; but life consists of more than cheques and balance sheets. The indomitable human spirit craves more than just his bowl of rice and to live in a safe environment. These are crucial but so too is the quality of this environment. The human spirit desires to worship as his conscience dictates, to freely articulate his thoughts, to develop his talents, to have access to education, to be treated fairly and equally, to breathe fresh air, to speak his own language, to promote and preserve his cultural heritage. The intangibles matter. They differentiate us from mere beasts. The judicial task is to give life to these aspirations which the constitution preserves room for through its commitment to pluralism, secularism and liberties within the framework of a just order. This requires the judge to have a finger on the pulse of community values, as the country, like all other countries, seek to continually articulate, renew and validate their collective identity pursuant to the right of self determination. But ascertaining who the 'self' is cannot be an exclusive but an inclusive process: culture cannot be dictated by the elite few. It is something which seems to obey the 'law of gravity' insofar as it stems from the grassroots rather than from top-down imposition which lacks 'internalisation' and[160] rests on insecure foundations.

As far as trends in constitutional interpretation go, judges seem to be influenced by the formal English doctrine of legal positivism which in turn

[160] See generally Abdullah Ahmed An-Nai'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights" in *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, Na'im ed (1992).

[161] It would appear that the judicial deference to executive determinations also cropped up in the case of *Jasbir Singh* v *PP* [1994] 2 SLR 32 which was concerned with the Art 9(3) constitutional right to legal counsel which reads: "When a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice." The Court rejected the argument that an accused had an immediate right to see counsel and instead adopted the test in *Lee Mau Seng* v *Minister for Home Affairs* [1971] 2 MLJ 137 that the right to counsel had to be "within a reasonable time after his arrest". In this case, the appellant was only allowed access to counsel after a two week period which on the facts of the case, the Court found to be 'within a reasonable time' since this formulation had built into it an allowance for police investigations. 'Two weeks' was not laid down as an across the board test of what

precipitates a deferential posture *vis-à-vis* the fused legislature-executive.[161] Constitutional principles seem to receive only perfunctory consideration and there is a general reticence when it comes to international "sources" of law. The narrow and literal, and one might say parsimonious approach to Part IV stands in contradistinction to the admonition in *Ong Ah Chuan* to adopt a generous interpretation. There is a reluctance to declare unwritten law as evinced by the general commitment to strict textualism[162]. This trend which *Jabar* exemplifies, eschews a purpose-oriented, historical or moralistic approach to constitutional adjudication as judges refuse to adjudge the morality, justice and reasonableness of laws. This is left to the province of the legislature with the attendant danger that the majority can always pass immoral, unjust and unreasonable laws. Since human rights are essentially a moral and ethical issue and since the object of Part IV is devoted to securing human rights, it is not surprising that the current approach to reading Part IV has not lead to the development of a robust human rights jurisprudence which must struggle in the relentless attempt to give life to maximum freedom without compromising the order that liberty depends upon for its effective enjoyment. Conversely, the case law seems to show a bias in favour of communitarian interests as defined by the relevant state bodies. It may even be argued that the Court adopted a 'categorisation' or no-balancing approach in *Colin Chan* where the existence of a single (statist) factor (the possibility of a threat to national security) seemed to be determinative.[163] The paramountcy attributed communitarian interests should be balanced against the following consideration:

The attempt of the Court should be to expand the reach and ambit

'reasonable' constitutes – this must be determined on the facts. The uncertainty of this approach is clearly unsatisfactory especially if the Court is quick to accept the executive's determination of what 'reasonable' constitutes – this could effectively nullify the right to counsel and what it seeks to protect. It would be preferable if the Court laid down some concrete guidelines in the assessment of 'reasonableness'. See M Hor, "The Right to Consult a Lawyer" (1989) CLAS News No 3 p 4 and (1989) CLAS News No 4 p 4.

[162] Though it seems an extra-textual approach was adopted in *Colin Chan* v *PP, supra,* note 97 though this was directed more at affirming the legislative policy of national service rather than the Court going off on a creative tangent.

[163] Thio Li-ann, "The Secular Trumps the Sacred: Constitutional Issues Arising out of *Colin Chan* v *PP*" (1995) 16 Sing LR 26 at 82-85; see also the subsequent cases of *Liong Kok Keng* v *PP* [1996] 3 SLR 163, *Chan Cheow Khiang* v *PP* [1996] 3 SLR 271 and *Dennis Kok Hoong Tan* v *Public Prosecutor*, [1997] 1 SLR 123.

[164] *Maneka Gandhi* v *Union of India* [1978] 2 SCR 621 at 670A-H.

of fundamental rights rather than attenuate their meaning and content by a process of judicial construction.[164]

The constitution is a normative document. As such, the approach of the Privy Council in *Ong Ah Chuan* in construing 'law' as something which is in consonance with "fundamental principles of natural justice" situates 'law' in a normative context. Notions like justice, humanity, fairness, common sense may be vague but they play the crucial function of addressing our minds towards the purpose of law as something beyond being an instrument of power. Mercy triumphs over judgment and the quality of mercy cannot be strained in a humane, civilised and gracious society. We cannot disregard the concepts and values which form the inner fabric of its being without an evisceration of its character. We the People will be impoverished otherwise.

A Bill of Rights makes the normative assertion that the individual has intrinsic worth and should be treated with dignity. No democratic government would dare openly contradict this assertion. This is not an open invitation to unbridled individualism, in its 'western' incarnation as hedonistic egotism or as manifested through the 'Singaporean' strain of *kiasuism.*[165] The formulation of constitutional liberties recognises that society has legitimate demands on its members but the concept of 'society' implies that a group of people decided to live together because they held fundamental values in common, some of which are manifested through the adoption of a written constitution as the political blueprint of community. But derogations from constitutional liberties should be strictly controlled by courts as befits their status as exceptions to a norm rather than the norm. This is necessary if the spectre of austere legalism which resides in *Arumugam*, and which the latest parade[166] of local constitutional law cases seem to manifest, is to be banished. To paraphrase Ronald Dworkin, this is what is required if the discipline of constitutional law and the constitution itself is to be taken seriously.

THIO LI-ANN*

165 A Hokkien term which is part of Singapore slang. Literally, it means "scared of losing out".

166 An interesting exception is the case of *Christopher Bridges* v *Public Prosecutor* whereby Yong CJ held in a landmark decision that the prosecution had failed to make out a case that a certain piece of information was 'secret information' within the terms of the Official Secrets Act even though the government had characterised it as such: "It is ludicrous to suggest that information such as "the sun rises in the east" is secret official information even if it is classified 'Top Secret' by a government department. Common sense dictates that a line must be drawn somewhere." The government *ipse dixit* was not accepted: [1997] 1 SLR 406. See also the *Straits Times,* 23 January 1997 at 44.

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