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RECENT CONSTITUTIONAL DEVELOPMENTS: OF SHADOWS AND WHIPS, RACE, RIFTS AND RIGHTS, TERROR AND *TUDUNGS*, WOMEN AND WRONGS

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This article seeks to draw out the constitutional significance of recent events and developments in Singapore government and politics and to provide a provisional orientation for evaluating the legal issues raised. These developments illumine the nature of local constitutional culture as well as issues of identity, rights discourse and modalities of accountability, as an aspect of Singapore constitutionalism. Topics examined include the issue of minority rights and state interests in the light of the *tudung* controversy, developments towards a "self-regulatory" model of parliamentary democracy and the issue of unenumerated constitutional liberties as a possible line of development in Singapore constitutional jurisprudence.

I. INTRODUCTION

This essay seeks to draw out the constitutional significance of recent events and developments in Singapore government and politics and to provide a provisional orientation for thinking through some of the legal issues raised. These developments shed light on local constitutional culture as evident in government practice, legislation and case law, as well as upon issues relating to identity, rights discourse and accountability mechanisms as an aspect of constitutional government. It is particularly important to appreciate the functioning of legal institutions in the context of Singapore political culture. As constitutional scholar W Ivor Jennings noted:

> A constitution, in anything more than a formal sense is only an organisation of men and women. Its character depends upon the character of the people engaged in governing and being governed…an examination of its working involves an examination of the social and political forces which make for changes in the ideas…of the population and its various social strata…no lawyer understands any part of the law until he knows the social conditions that produce it and its consequences for the people who are governed by it. But the lawyer's peculiar contribution to the study of political society is the examination of the

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> principles which at any given time are regulating the relations of political institutions.[1]

This essay will first examine institutional values in relation to the workings of Singapore's system of parliamentary democracy. It will then examine recent developments bearing on the scope and approach towards civil liberties before concluding with some observations on constitutional or legal culture.

II. INSTITUTIONAL VALUES AND POLITICAL CULTURE

A. *Parliamentary Democracy in a Depoliticised Environment*

At the November 2001 general elections, the ruling People's Action Party (PAP) continued to maintain its overwhelming dominance in Parliament,[2] winning a resounding 75.3% of the vote, up from 65% in the 1997 elections.[3] Hence, parliamentary democracy in Singapore continues to operate in the context of a hegemonic *de facto* one party state, though political pluralism formally exists in Singapore, with some 20 political parties registered under the Societies Act (Cap 311).

If democracy is rule by the people, elections are the means through which the people choose their rulers and it is through elections that an elected government earns political and moral legitimacy. The electoral process reaffirms at periodic intervals that government is servant to the people and accountable to them. However, the political landscape in Singapore is such that most eligible voters do not have the opportunity to vote owing to the large number of uncontested electoral wards. Only 29 of 84 seats in Parliament were contested in the 2001 elections, with the incumbent government returned to power on nomination day having won 55 uncontested seats. This means that only about 33% of eligible voters voted.

This state of affairs has spurred concern on the part of civil society groups that voting in Singapore would soon degenerate into a non-event,[4] ham-stringing the evolution of a healthy parliamentary democracy which must involve a concerned citizenry. This is predicated on competition among political parties, and the possible replacement of the incumbent government by an alternative government, a fundamental political check in

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1 Sir Ivor Jennings, *The Law and the Constitution*, 4th ed (London: University of London Press, 1952) at xv.

2 Since the 1980s, the opposition parties have only been able to capture 1-4 parliamentary seats, out of about 80 available elective parliamentary seats. For information in relation to elections in Singapore, go to http://www.ecitizen.gov.sg/.

3 "75.3% -- Resounding win for PAP" *The Straits Times* (4 November 2001) at 1.

4 See "Walkover - When Polling Day is a non event" *The Straits Times* (14 April 2001) at H8-H9. Notably the last Presidential elections were not contested and hence, SR Nathan was declared elected to the office of the President on 18 August 1999 in accordance with section 15, Presidential Elections Act (Cap 240A).

the operation of Westminster-based constitutions. A political system where electoral walkovers are a common, if not dominant, feature is apt to breed apathy and detachment, whittling down the sense of legitimacy elections are supposed to convey. Being elected by default rather than active choice are two quite different things.

The evolution and construction of Singapore's legislative institutions and admission to them is built on the paramount value of ensuring stability. This translates into strong government or the effective control by the executive cabinet of the legislature, through stern application of the "whip" to ensure members tow the party political line.[5] From the outset, Singapore's Parliament differs from the Westminster prototype in being unicameral and operating on the basis of anti-hopping laws which means that if an MP changes political parties, he loses his seat.[6] This tends to provide support for the PAP's preferred view on representation – that voters vote not for the individual candidate but his political party (unless it is an independent candidate, of course).[7] Furthermore, the PAP has long argued that competitive politics can be inimical to stability, which is crucial for attracting foreign investment to feed the Singapore enterprise.[8] In conflating party goals with national goals, it is urged that perpetuating the political status quo is in Singapore's best interests.[9]

In adapting the Westminster system of parliamentary democracy to suit what the PAP perceives to be the exigencies of local circumstances,[10] the value of political pluralism has continued to be formally affirmed although the constitution does not recognise a constitutional role for the opposition.[11] Non-elective elements have also been introduced into Parliament, the

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5 Senior Minister Lee has argued against the workability of straightforward Westminster rules such as the first past the post system or allowing MPs to switch party allegiance while retaining their parliamentary seat: "SM: Textbook western-style democracy not for Singapore" *The Straits Times* (12 November 2001) at 3.

6 Article 46(2)(b), Republic of Singapore Constitution.

7 Opposition MPs like Low Thia Khiang and Chiam See Tong might well differ on the basis that they are elected not so much for their party's political programme but because of their personalities. "Opposition MP 'Hougang voters wanted me, and upgrading': Low" *The Straits Times* (5 November 2001) at H3

8 In speaking of the PAP strategy to co-opt good people into government, an apologist argument for retaining the political status quo was that "[i]f they are good, the PAP will offer them places in government. Instead of being in the wilderness for two or more terms, trying to build up a credible alternative, they can join the PAP and change its policies from within". The PM Press Secretary argued that election rules "make for stable Govt": Forum, *The Straits Times* (22 November 2001) at 3.

9 "Is the ruling party Singapore? PAP believes that its objectives have become synonymous with those of the people it governs" *The Straits Times* (20 November 2001) at H2.

10 It is fair to say that the PAP as the only government Singapore has known since independence has been the architect of the Constitution, constitutional amendments, which requires a two-thirds parliamentary majority (Article 5), are easily secured.

11 In other jurisdictions, the leader of the opposition is recognised as a constitutional office and is paid a salary out of consolidated funds: SA de Smith, *The New Commonwealth and its Constitutions* (London: Steven & Sons, 1964) at 102-3.

highest elective body, in the form of the Non-Constituency MP (NCMP) and Nominated MP (NMP) scheme introduced in 1984 and 1990 respectively, which have been subject to criticism.[12] The rationale for introducing the NCMP scheme was to guarantee a token opposition presence in government. This seems to be predicated on the presumption that politics will continue to be dominated by a single political party.[13] The scheme lapsed after the 1991 General Elections when four opposition politicians were directly elected into Parliament. It has since been revived as the PAP presently commands 82 of 84 elected seats. In the last elections, the two opposition MPs, Low Thia Khiang (Hougang) and Chiam See Tong (Potong Pasir) retained their wards. The top loser who contested in Chua Chu Kang, Steve Chia of the Singapore Democratic Alliance, accepted a Non-Constituency MP (NCMP) seat, having polled 34.7% of the votes,[14] which satisfies the minimal requirement of polling 15% of the votes of the electoral division contested. This scheme differentiates between classes of parliamentarians, allowing "second class" parliamentarians a seat in Parliament that carries weaker voting rights than those of elected MPs (whether elected through competition or default), with the NMCP's inferior office reflected in the smaller NCMP allowance.[15]

The NMP scheme was conceived to provide for further alternative non-partisan voices in Parliament, to tap the expertise of people not wanting to enter the political fray. This was because the ruling party deemed that opposition MPs "do not adequately express significant alternative views held outside this Chamber".[16] Once again, this scheme envisages the continued presence of a weak opposition unable to discharge its function debating and scrutinising government policy, let alone providing the

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12 Thio Li-ann, "The Post-Colonial Evolution of the Singapore Legislature: A Case Study" [1993] Sing JLS 80 at 97-102.

13 See Valentine S Winslow, "Creating a Utopian Parliament" (1984) 28 Mal LR 268.

14 Article 39(b) of the Constitution provides for "such other Members, not exceeding 6 in number, who shall be known as non-constituency Members, as the Legislature may provide in any law relating to Parliamentary elections to ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government". See Section 52, Parliamentary Elections Act (Cap 218) which provides for the possibility of 3 NCMP seats (up to 6 seats as the President may specify for a particular general election). "Chia's Call -- BG Lee hopes he'll accept NCMP seat" *The Straits Times* (3 November 2001) at 3.

15 "NCMPs will not be paid more" *The Straits Times* (16 May 2002) at H2. Criticisms have been expressed against Home Minister Wong Kan Seng's comments that unlike elected MPs, NCMPs do not represent anyone regardless of the percentage of votes polled. This is because many of the elected MPs in the past three general elections did not have to "work the ground" and won their seats in Parliament through walkovers, without facing competition. "NCMPs deserve same rights as MPs" Forum, *The Straits Times* (18 May 2002) (available on Lexis, accessed 22 May 2002). NCMPs are paid a monthly allowance of S$1303: "Future of Workers' Party in jeopardy now JBJ is bankrupt" *The Straits Times* (2 August 2001) at H7.

16 Goh Chok Tong, *Singapore Parliamentary Debates, Official Record*, 29 November 1991 col 695.

prospect of political turnover, the peaceful changing of the reins of government as determined by the ballot box. Arguably, this has marginalised opposition politics through a system of "government controlled independent voices".[17]

Each Parliament has to decide whether to have NMPs in the House, with the current session of Parliament deciding in the affirmative, despite the raising of objections by both PAP MPs and other voices.[18] Furthermore, the NMP scheme seems to be undergoing an evolutionary change of some significance, aside from the proposed extension of NMP parliamentary terms.[19] The selection process has been modified by introducing proposed panels which will nominate representatives of functional groups like business and industry, labour, and the professions as possible candidates for the Parliamentary Special Select Committee's consideration. Aside from excluding certain interests groups,[20] this modification would appear to lead to the selection of individuals with partisan interests, with the prospect of interest group politics being introduced into the House. This seems to go against the grain of the original NMP scheme to introduce voices reflecting "as wide a range of independent and non-partisan views as possible".[21]

Aside from having non-elective MPs in an age of democracy, pluralism in representation has also been introduced through the Group Representation Constituency (GRC) scheme or multi-member MP team which requires that one member of a GRC team must belong to a stipulated minority group, thus entrenching multi-racialism in parliamentary composition.[22] The political opposition has thus far not been able to contest many or even win a single GRC ward since its institution in 1988, which would yield between 4-6 parliamentary seats.[23] Given the prevailing

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17 Legislation before the Vietnamese National Assembly is being enacted to make it easier for non-members of the ruling Communist party to stand for parliament, in recognition of the need for independent candidates. There was speculation that it might move towards a "Singapore style system of controlled independent voices": "Vietnam to relax its electoral rules" *The Straits Times* (22 November 2001) at A4.

18 See *Singapore Parliament Reports*, Volume 74, 4 May 2002, col 571-632.

19 An NMP term currently runs for two-years, with plans to extend it to 2.5 or 3 years. The rationale for this is to ensure that a Parliament during the course of one full term will only have to undertake the NMP selection process twice. "Longer term for Nominated MPs" *The Straits Times* (6 April 2002) at H11.

20 "The missing constituencies in NMP scheme" Commentary/Analysis, *The Straits Times* (1 October 2001) at 15. These include the elderly and singles. The idea of expanding the pool from whence NMPs could be drawn has had some force and it was decided to ask three groups of people, social and community workers, people in arts and sports and tertiary educators to submit names: "NMPs to come from wider pool" *The Straits Times* (21 March 2002) at H2.

21 Fourth Schedule, Republic of Singapore Constitution.

22 Article 39A, Republic of Singapore Constitution.

23 For an analysis on the effects and implications of the GRC scheme, see Kevin YL Tan, "Constitutional Implications of the 1991 General Elections" (1992) 26 Singapore Law Review 46. See also, "Is Singapore's Electoral System in need of reform?" (1997) 14 Commentary 109-117. Notably the GRC scheme, some peopled by six members, now

political conditions — with none of the opposition parties being likely to present a viable alternative government in the foreseeable future — it is clear that constitutional institutions like the GRC scheme practically effects a perpetuation of the political status quo or the value of stability.[24] Furthermore, by allowing MPs to enter Parliament on a "red carpet" without a political baptism of fire, it was feared that MPs would exercise political power without the express endorsement and legitimisation of their voting constituents.[25] Furthermore, since the act of voting coheres the idea of citizenship, non-exercise of the voting muscle over extended periods can only cause atrophy, apathy and detachment. An apathetic citizenry flies in the face of the Singapore 21 Vision of engaging both the mind and heart in the project of nation-building, such that the denizens of the city-state will "feel passionately about Singapore".[26] One could imagine that the situation

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dominates the political landscape, replacing single member wards. In the course of altering electoral boundary lines, wards like Anson, Eunos and Cheng San, which were considered marginal wards as they manifested strong support for opposition politicians, received their *quietus est* at the stroke of a pen. The frequent alteration of electoral boundaries by an ad hoc Electoral Boundaries Review Committee, composed of civil servants appointed by the Prime Minister, has raised the issue about the desirability of having an independent elections agency in Singapore: see "Should Singapore have an independent elections agency?" *The Straits Times* (22 December 2001) at H10-11; "Drawing the battle lines for General Election" *The Straits Times* (4 May 2001) at H7.

24 Prime Minister's Press Secretary, in Forum, *The Straits Times* (22 November 2001) argued that election rules "make for stable Govt" at 3. With respect to the GRC scheme the prioritising of stability over issues of legitimacy is also reflected in the fact that when a member of a GRC team dies or otherwise leaves the team, there is no legal duty to call a by-election to seek a fresh mandate, despite the fact that members of that GRC constituency will be served by less than the team they voted for. When Choo Wee Khiang resigned his Jalan Besar GRC seat after being charged with a criminal offence, no by-election was called, with the proffered reason being the need not to be distracted from taking care of economic issues: "A by-election or not" *The Straits Times* (3 June 1997) at 37; "By-election secondary to crisis recovery" *The* Straits Times (5 June 1999) at 2; "Why there should be a by-election" Commentary, *The Straits Times* (9 June 1999) at 46.

25 The Roundtable, "Lack of competition will hurt PAP and Nation" Forum, *The Straits Times* (10 November 2001) at 26.

26 The Singapore 21 Initiative embodies the government's Vision for Singapore in the 21st Century. The Singapore 21 book is available at http://www.singapore21.org.sg/s21_reports.html. See also the parliamentary discussion of Singapore 21, *Singapore Parliament Reports* Volume 70, 5 May 1999 cols. 1442-84. Notably, Prime Minister Goh Chok Tong opined that "…Singapore is not yet a nation. It is only a state, a sovereign entity" (col. 1475). Concerns about the lack of attachment to Singapore among Singaporeans have increasingly been articulated, recently in the minor controversy sparked when a Minister of State reported his 11-year-old son's question: "If there is a war, why should we fight for Singapore?": "Singaporeans prepared to fight for nation" *The Straits Times* (17 May 2002) at H5.

Notably, the Singapore 21 vision has been criticised for encouraging the development of community bonds while remaining silent on the subject of politics: see James Gomez, "Singapore: The Singapore 21 Report: A Political Response", available at http://www.singapore-window.org/sw99/90521jgz.htm (accessed 22 May 2002). The government's predilection for depoliticising issues is also reflected in the omission of

would change drastically, if Singapore reverted to a "first past the post" electoral system in single member wards.

B. *Shadows and Whips*

While discounting the idea of a parliamentary opposition as divisive and destabilising and therefore, not of importance, the ruling party is still keen to prevent the projection of an image of Parliament as a monolith. Prior to the 2001 General Elections, Prime Minister Goh mooted the possibility of splitting Parliament into two groups, with the Government facing off against an "alternative" group of PAP parliamentarians, musing how this bifurcation could be "the beginning of a good two-party system".[27]

The need to promote debate within a one party dominated Parliament is reflected in the expressed purposes of the NMP institution as well as the Government Parliamentary Committee (GPC) scheme which allows MPs to join one of 11 Committees focussing on a specific topic and attaining some specialist knowledge. This, it is hoped, would sharpen debate and therefore, the policy-making process, while ensuring that this process remains a co-operative, rather than antagonistic, endeavour.

When Prime Minister Goh proposed the novel idea during electoral campaigning in October 2001 of having a group of 20 PAP MPs and NMPs play the role of a shadow Cabinet, it appears this was being offered to voters as an alternative to voting in opposition politicians.[28] Describing his proposal as a "shadow cabinet", replete with a shadow prime minister,[29] is a misleading if perhaps unintentional borrowing of nomenclature as it is more apt in a bi-partisan system. A shadow cabinet in a parliamentary system is conventionally composed of members of the leading parliamentary opposition group who "track" and check developments in specific policy fields and who are ready to step in and form the new cabinet if the next election so empowers them. PM Goh later renamed his idea the "alternative policies group" or the People's Action Forum. He proposed lifting the party whip for the 20 PAP MPs.[30] This is another suggestion in a long line of

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political values from its declared national ideology contained in the Shared Values White Paper, Cmd 1 of 1991, see paras. 47-51.

27 "PM Goh plans alternative PAP voice in Parliament" *The Straits Times* (3 November 2001) at H3.

28 This is apparent insofar as he is reported to have said that to set up this shadow cabinet or forum, the condition was that no more than two opposition MPs must enter Parliament, which was perhaps prophetic in hindsight: "Make forum independent and real" *The Straits Times* (19 December 2001) at H11.

29 In discussing the shadow cabinet, Prime Minister Goh considered appointing a shadow prime minister and perhaps having the GPC chairmen as shadow ministers: "Lifting party whip a good idea: PAP MPs" *The Straits Times* (8 November 2001) at H2.

30 "What PM Goh's shadow Cabinet is all about" *The Straits Times* (8 November 2001) at H2. As far as lifting the whip on "opposition" PAP MPs, this would be in relation to everything save constitutional bills. PM Goh noted: "I'm confident that as a Government, I have enough control over my own backbenchers, that nothing will go wrong. You can then

developments that prefer a mode of internal regulation or self-restraint with respect to conducting politics and the decision-making process, with this Forum not posed as quasi-opposition but a non-threatening source of alternative policies.[31] While it could enliven debate, provide alternative views and might heighten political education among the citizenry (assuming that a genuinely non-conformist tack is allowed to emerge), it does not entail any real power change. Parliament would thus not be a site of competitive politics but policy fine-tuning and perhaps a limited measure of ministerial accountability. However, there are always inherent limitations in having people from the same political party check that political party. Much like the art of shadow-boxing, but never quite packing a punch!

While the suggestion to lift the whip was applauded, as PAP MPs would have greater moral authority if they could vote according to their conscience, the response towards the idea of a shadow cabinet was more reticent.[32] The current policy seems to centre around a more liberal approach towards the "whip", which has only been lifted thrice since the PAP formed the ruling government.[33] However, the governing elite consider it inimical to lift the whip entirely as they consider that since voters cast their votes on the basis of the political parties' programmes, maintaining party discipline is necessary to effect their implementation.[34] This attempt at stimulating debate among PAP MPs without losing control over the process may represent an attempt to allay the electorate's cynicism regarding Parliament's effectiveness in checking the cabinet.[35]

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generate debate in Parliament" – "Party whip to be lifted partially for 20 PAP MPs" *The Straits Times* (7 November 2001) at H1.

31 Other self-regulatory restraints being the NMP scheme, the Government Parliamentary Committee scheme, or the past function of PAP backbenchers as internal critics. See Kevin YL Tan, "Parliament and the Making of Law in Singapore" in KYL Tan ed., *Singapore Legal System*, 2nd ed (Singapore: Singapore University Press, 1999) at 123-159.

32 "Can a shadow play have real impact?" *The Straits Times* (15 December 2001) at H16-17; "Cheng Bock against idea of forum" *The Straits Times* (15 December 2001) at H17; "Building an effective shadow cabinet" *The Straits Times* (8 November 2001) at 17.

33 Apparently, the whip will be lifted for all matters of conscience, and certain issues, excluding constitutional amendments, no-confidence motions, money Bills and issues of national security. MPs may also request exemptions from the whip on a case by case basis: "More 'nays' with lifting of whip?" *The Straits Times* (21 March 2002) at H2; "PAP eases up to let MPs debate more freely" *The Straits Times* (21 March 2001) at 1.

34 "Not in people's interest to lift the Whip" *The Straits Times* (6 April 2002) at H7.

35 "Why are people cynical about politics? -- Former Speaker Tan Soo Khoon" *The Straits Times* (4 April 2002) (available on Lexis, accessed May 2002).

III. SAFEGUARDING CIVIL LIBERTIES

A. *Democracy and the Regulation of Political Speech and Electioneering*

Even within the context of communitarian democracy where "consensus instead of contention" is the declared order of the day,[36] the healthy enjoyment of civil liberties like the constitutionally guaranteed freedom of speech,[37] association and assembly[38] is necessary to sustain a democratic ethos.

(i) *Unspoken Limits*

Free speech in general is qualified and is subject to strict restrictions where these are "necessary and expedient" in the name of public goods, health and order.[39] Political speech is also subject to curtailment, as is manifest both in legislative policy and practice and defamation law, especially with respect to the prioritising of politicians' reputations.[40] There are limits in terms of how political discourse may be conducted, who may engage in this, the subject matter and the correct attitude to adopt in such engagement. This may be explained or justified by invoking distinct "Asian values", the legitimating device *de jour*. First, a narrow definition of political speech is adhered to insofar as the government has stated its view that only people involved in politics, that is, politicians, should engage in political discourse, meaning, the merits and otherwise of policies of the day. The range of

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36 *Shared Values White Paper*, Cmd 1 of 1991, para 52.

37 See generally, Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1985) especially chapters I, III, V, X.

38 After being denied by the police of a licence to stage a May Day rally outside the grounds of the President's office, opposition politician proceeded to stage one and was arrested: "Police flayed for 'overzealous' May Day arrest", Reuters (2 May 2002), available at http://www.singapore-window.org/sw02/020502re.htm (accessed 22 May 2002). He was charged with trespass. Previously, Chee had been twice charged and convicted under the Public Entertainment Act (Cap 257) for giving unlicensed public speeches in December 1998 and February 1999. The Act requires that a permit be obtained for public events involving more than five people.

39 Article 14, Republic of Singapore Constitution.

40 The Singapore approach is that articulated in *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310. This is reflected in the rejection of a "public figure" doctrine such as that accepted in *New York Times v Sullivan* (1964) 376 US 255. The judicial approach in Singapore also discounts the importance of avoiding an unduly "chilling effect" on political speech critical of public institutions in a democratic society, as affirmed in the UK case of *Derbyshire County Council v Times Newspapers* [1993] AC 534. The extremely high damages awarded in cases of defamation for speeches made by opposition politicians has also come under criticism as a technique to control or regulate political dissent: see *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97; Judge Paul Bentley, "The Politics of Defamation in Singapore" (Autumn 1997) Provincial Judges Journal, Canada, available at http://www.singapore-window.org/80217can.htm (accessed 22 May 2002).

speakers is thus limited, unduly.[41] Secondly, in engaging in political speech, one is enjoined not to transcend the "OB markers", presumably in terms of subject matter.[42] These OB markers, notoriously ambiguous, are declared by the government and must inject a high degree of uncertainty and thus, exert a muzzling effect on potential speech. Last, one should preserve a certain deference in debating, best encapsulated by the admonition to maintain distinctions between the senior and junior party, what the Hokkiens refer to as "*boh tua, boh suay*". In making this observation, Minister George Yeo noted: "You must make distinctions – what is high, what is low, what is above, what is below – and then, within this, we can have a debate, we can have a discussion". Thus, his view is that political authorities are to be treated as superior and that the average man in the street must not presume to address them as "equals".[43] This rejects the idea of democratic equality in favour of an antiquated feudalism. Cumulatively, this requirement that only politicians speak politics in a manner which respects authority and within the constraints of undefined OB markers sets its face against robust, free and frank debate. This tendency to control speech will have to be managed against the government's desire to be more consultative and to promote civic participation.[44]

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41 "Join a party if you want to contribute" *The Straits Times* (9 September 1993) at 33. Catherine Lim, who wrote an article on the style of government was asked by the government to join a political party if she wanted to take part in political debate. "Remaking Public Debate", "Singapore section" *The Straits Times* (9 March 2002), (available on Lexis, accessed 22 May 2002).

42 "Only those elected can set OB markers: Senior Minister's Lee Kuan Yew's interview with the New Paper" *The Straits Times* (3 February 1995) at 22. He cautioned against moving the OB markers such that the stability of the political system will be imperilled: "SM: Danger in challenging system" *The Straits Times* (19 September 1999) at 2. When Goh Chok Tong became Prime Minister in 1990, he sought to widen spaces for political and artistic expression, coining the idea of setting OB markers clearly to ensure awareness of the limits of openness and consultation. This crystallised in response to the Prime Minister's reaction to an article by Dr Catherine Lim about the "great affective divide" between the government and Singaporeans and how he considered she had gone beyond the pale. See also, "Move beyond OB markers to tackle challenges" *The Straits Times* (16 August 1997) at 34 where the function of OB markers was described as protecting societal fundamental values and ensuring societal leaders are accorded proper deference. It is interesting to note that the Singapore 21 Committee in advocating the delineation of OB markers in more precise and transparent terms to encourage more active participation in civic life noted that the lack of willingness among Singaporeans to participate stemmed from a sense that they had no ownership over the issue, that the government lacked respect for their views and that they did not trust the government sufficiently to engage in frank discussion without eliciting unpleasant consequences. Chapter 6: Active Citizens: Making a Difference to Society in *Singapore 21: Together we make the Difference*, available at http://www.singapore21.org.sg/menu_s21report.html (accessed 22 May 2002).

43 "Debate yes, but do not take on those in authority as 'equals'" *The Straits Times* (20 February 1995) at 19.

44 Kevin Tan, Valentine Winslow, Lam Peng Er, "Show of good faith needed for civil society" Commentary/Analysis, *The Straits Times* (28 January 2000) at 80. The government has expressed its intention to increase political space in "gradual increments": "Govt to open up political space gradually" *The Straits Times* (9 February 2002) at 4.

(ii) *Election Laws and the Regulation of Speech and Expression*

Opposition politicians have often criticised the unfairness of the electoral system. Common examples cited include the instances of gerrymandering with the frequent re-drawing of electoral wards,[45] the short campaign period of a minimal 8 days and raising election deposits from $1500 in 1988 to $13,000 today, which in being prohibitively costly, might impair rights of candidature.[46] To contest a six-man GRC would entail the considerable sum of $76,000.[47]

Laws have recently been passed which seek to regulate speech for content in relation to election campaigns. On 13 August 2001, the Parliamentary Elections Act (Amendment No 2) (Bill No 29/2001) was enacted which sought to regulate election advertising, including through the Internet.[48] It makes it an offence for anyone to publish such advertising without identifying the printer's name, its publisher, and the person who is the object of advertising. The new Section 78A empowers the Minister to make regulations governing non-printed election advertising in an election period and Internet election advertising by political parties or persons who must register with the Singapore Broadcasting Authority before providing any programs that discuss Singapore related political issues.[49] Furthermore,

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[45] For example, Christopher Neo of the Singapore Democratic Alliance had been cultivating the ground in Bukit Gombak, only to find that this previously single member ward was subsumed into a GRC just 2 weeks before polling day: Tan Tarn How, "More level playing field needed, to be fair" *The Straits Times* (11 November 2001) at 42.

[46] This is pegged to the allowances paid to MPs: "Should Singapore have an independent elections agency?" *The Straits Times* (22 December 2001) at H10-11. This deposit is forfeit if the candidate polls less than one-eighth of the votes in the ward contested. Opposition politician JB Jeyaretnam suggested that this deposit requirement might be illegal as there was nothing in the Constitution which required that a candidate must have a certain level of wealth before he can stand. Furthermore, that the sum of $13,000 was unduly high, compared with the election deposits payable in other countries like Britain, Malaysia and Australia. A candidate for the Australian senate pays a deposit of A$700 only (S$664). "$13,000 deposit questioned" *The Straits Times* (24 October 2001) at H7.

[47] "Elections not fair, says NCMP" and "Opposition hits out at election rules" *The Straits Times* (4 April 2002) (available on Lexis, accessed 22 May 2002). Complaints about unfair election rules relate mainly to the short one day interval between the release of the Electoral Boundaries report and the dissolution of Parliament in October 2001, the lack of election rally sites in single member constituencies, the $13, 000 election deposit requirement and arguing that smaller sized GRCs could equally serve well the aim of ensuring minority representation in Parliament.

[48] "Parties can now take polls battle to cyberspace" *The Straits Times* (14 August 2001) at 1. See generally Garry Rodan, "The Internet and Political Control in Singapore" (1998) 113 Political Science Quarterly, 63-89.

[49] In protest the Think Centre shut down its on-line discussion group as it could not police posts which might contain what might be considered political campaigning, since non-political groups could not engage in election advertising. "Think Centre shuts web forum", *The Straits Times* (17 August 2001) at H3. Sintercom, a web forum providing alternative political viewpoints was also sent a letter by the Singapore Broadcasting Authority asking it to register because the website contained political content. Eventually, the founder of

web-sites not affiliated with any political party are barred from campaigning for one. Only political parties and their election agents can send out e-mail and SMS soliciting support.[50] Critics fear that this might have a further "chilling" effect on expressions of political speech and further curtail opportunities for that expression.[51]

Peculiarly, the expression of political ideas was curtailed by the Films (Amendment) Act (Act 10 of 1998) which places party political films seeking to influence new laws or elections on the same footing as obscene films. The new Section 29 makes it an offence to be involved in commercially exploiting obscene films while under the new Section 29D, it is an offence to make, reproduce, distribute or exhibit any party political film. This was justified on the basis that sufficient outlets for political expression existed and that political advertising through films were in danger of being sensationalist and inaccurate.[52] This has been criticized as further limiting the mediums available for engaging in political discourse, to the particular detriment of opposition parties.

(iii) *A Model of Managed Speech: Speakers Cornered?*

There have been recent attempts to open up "political space" for free speech, although critics consider this an exercise in tokenism. For example, Speakers' Corner, named after the famous one in Hyde Park, London, was established in August 2000 under Public Entertainments (Speakers' Corner) (Exemption) Order 2000 pursuant to Public Entertainments and Meetings Act (Cap 257) in Hong Lim Park. It opened on 1 September 2000.

This initiative, proposed by a private citizens group, was ostensibly to allow for the freer expression of divergent political views. The Government located this gesture as part of its policy of being receptive to citizens'

Sintercom decided to close it down, partly because of the letter: "Website with political content told to register", *The Straits Times* (18 August 2001) at H7.

50 "E-campaigning: Curbs on email, SMS 'unnecessary'" *The Straits Times* (19 October 2001) at H9.

51 "Parties web features don't violate Net rules" *The Straits Times* (15 August 2001) at H1. Steve Chia, the National Solidarity Party's Secretary-General, argued that in the past organisations like the National Trade Union Congress and *The Straits Times* itself had openly endorsed the PAP and that as a matter of fairness, all bodies should be able to campaign freely.

52 BG Yeo in justifying the ban on party political films argued that not to do so would degrade Singapore's democracy and turn debate on policy issues into an advertising contest similar to selling soap. This amended law stemmed from the decision not to grant Dr Chee Soon Juan of the Singapore Democratic Party a licence in March 1996 to make a political video. If not, it was feared that during the 9-day election campaign, candidates would be too busy "putting on makeup, combing their hair, dressing up, appearing in political videos and distributing them to win votes." Concerns were expressed that the amendment was too sweeping and vague, would stifle political and artistic expression and could potentially cover any film making a comment on political issues. "BG Yeo explains ban on party political films" *The Straits Times* (28 February 1998) at 27.

views,[53] while owning that it was more "emblematic" than practically significant.[54]

While the Corner is of symbolic value as a free speech venue, perceived as a loosening of the PAP's paternalistic grip, it is governed by a restrictive regime. This requires that speakers be Singapore citizens, that they register at a nearby police station with proof of identity 30 days before speaking and that they avoid discussing sensitive topics. These include racial and religious matters or issues that may cause "feelings of enmity, hatred, ill will or hostility between different racial or religious groups". Furthermore, the use of amplification devices during public speaking is prohibited. Non-compliance could attract penalties of a fine up to $10,000 and a 30-day suspension from speaking at the Corner. It is left to police discretion to determine whether any of these conditions have been contravened.[55]

While exempted from general licensing requirements, public speakers remain subject to the general laws of the land. This includes being susceptible to defamation suits. Speakers cannot engage in speech which contravenes the Penal Code (Cap 224), the Maintenance of Religious Act (Cap 167A) and the Sedition Act (Cap 290). Thus, the Corner has been termed a model of "managed" free speech. Since its inception, more than 1000 people have registered to speak. In March 2001, two civil society activists who organised an event at the Speakers' Corner rallying against the Internal Security Act without a police permit were warned that they would be prosecuted for illegal assembly in the future. Demonstrations thus cannot be conducted there *sans* permit.[56]

B. *Of Unenumerated Rights*

Upon attaining independence in August 1965, Singapore adopted a system of constitutional government based on the Westminster system of parliamentary government, a British export.[57] There were significant departures from this model at the outset, an important one being the adoption of a Chapter on Fundamental Liberties in Part IV of the Constitution. This was at odds with the then prevalent British approach,

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53 *Singapore Parliament Reports*, volume 72, 22 May 2000, col 307-316.

54 "Minimal rules for Speakers' Corner" *The Straits Times* (21 May 2000) at 70.

55 In this respect, the police issued a statement alleging that opposition politician Chee Soon Juan had violated these conditions in speaking on the *tudung* issue on 15 February 2002, despite their having advised him that to speak on this subject (he had the previous week opposed the government's decision to suspend three Primary 1 students from wearing Islamic headscarves while attending school) would contravene the conditions and that an alternative forum to express his views could be sought by applying for a licence to speak at an indoor venue. "Chee flouts Speakers' Corner rule" *The Straits Times* (16 February 2002) at H3.

56 "Grappling with the reins of free speech" *The Straits Times* (22 February 2001) at H5.

57 See SA de Smith, "Westminster's Export Models: Executive and Legislature" in *The New Commonwealth and its Constitutions* (London: Steven & Sons, 1964) at 77-105.

influenced very much by Dicey's view, that the best way to protect individual liberties was through the common law technique as opposed to constitutional bill of rights.[58] Dicey thought that that the protections afforded by such constitutional documents could be easily abrogated through amendment by the relevant legislative body. Conversely, the presumption in English law was that an individual was free to act unless there was an express legal restriction, *eg* in a statute. Rights and liberties under the common law were the results of numerous case decisions stating the extent of specific liberties.

By enshrining liberties in the Singapore constitution, the rights safeguarded thereunder could be protected through the legal check of judicial review such that, with exceptions, legislation contrary to Chapter IV rights would be unconstitutional and nullified by the Article 4 supremacy clause.

The Wee Chong Jin Constitutional Commission in its 1966 report recommended adopting various constitutional liberties,[59] with appropriate modifications from the formulations contained in the Malaysian constitution from whence they were derived.[60] Not all its recommendations in this respect were adopted. Notably, the constitutional right to vote was omitted. The Wee Commission had rightly considered this particular right an

> inalienable right, the right to be governed by a government of [the people's] choice, expressed in periodic and general elections by universal and equal suffrage and held by secret vote.[61]

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[58] The UK has since adopted the Human Rights Act which came into effect in 2000. This allows British citizens to invoke the provisions of the European Convention on Human Rights and Fundamental Freedoms (ETS No 5), 213 UNTS 222, entered into force 3 September 1953, in their domestic courts rather than having to bring cases to Strasbourg. The government's rationale for the Act is contained in its white paper entitled "Rights Brought Home: The Human Rights Bill", presented to Parliament in October 1997, CM 3782, available on-line at http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm. On the rationale and impact of the Human Rights Act, see John Wadham *et al*, *Blackstone's Guide to the Human Rights Act 1998* 2nd ed (London: Blackstone Press, 2000). For Dicey's view in relation to rights protection, see AV Dicey, *The Law of the Constitution* (London: Macillan; New York, St Martin's, 1959) at 200-2.

[59] See Chapter II, Protection of Fundamental Rights and Freedoms of the Individual, 1966 Wee Chong Jin Constitutional Commission Report, reproduced in Appendix D, Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Singapore/Malaysia/Hong Kong: Butterworths Asia 1997) at 1022-6.

[60] Independent Singapore did not convene a constitutional assembly to draft a constitution but rather pragmatically retained provisions from the Constitution of Malaysia through the mechanism of the Republic of Singapore Independence Act of 22 December 1965. For an account on Singapore's Independence Constitution, see Kevin YL Tan, "The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day" (1989) 1 S Ac LJ 1, 6-17.

[61] Paragraph 43, *Report of the Constitutional Commission* (1996), reproduced in Appendix D, Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Butterworths Asia: 1997)

The use of the word "inalienable", signifying an inherent right which cannot be taken away or alienated by the state,[62] is indicative of this right's importance. There is no developed theory of inalienable rights in local constitutional jurisprudence but the concept has been judicially recognised. Karthigesu JA in *Taw Cheng Kong v Public Prosecutor*[63] considered that:

> Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties – not stick and carrot privileges. To the extent that the constitutional is supreme, those rights are inalienable.[64]

The lack of a constitutional right to vote represents a glaring omission in the citizen's bundle of constitutional rights particularly in the context of a system based on parliamentary democracy. As such, any right to vote can only be inferred from the regulations laid out in the Parliamentary Elections Act, and this inalienable right can thus be modified, curtailed or removed as easily as a dog licensing law in theory. Interestingly, Karthigesu JA classified the right to vote as a 'privilege' which connotes a lesser interest, one that is not entitled to as much protection as a 'right' which would be placed at the apex of individual entitlement in terms of protection afforded: "Other privileges such as subsidiaries or the right to vote are enjoyed because the legislature chooses to confer them – these are expressions of policy and political will."[65]

It is a sad state of affairs where the vote, the mechanism through which the popular will is expressed, foundational to a democratic order, is counted a mere privilege to be granted and withdrawn at the state's (or more accurately, the governing elite which controls the legislative agenda) leisure.

Rather than being confined to the obscurity of academic lamentation, the issue of voting and its juridical status became the subject of popular debate both in Parliament and in the media in May 2001. This was sparked off by

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62 In natural rights theory, the idea is that rights are "natural" or "inherent" in the individual, antecedent to the state and therefore, the state is not the source of the right but is rather tasked with protecting pre-existing rights. Of course, all natural rights theories stem from a political ideology, whether theistic or secular, which propounds the intrinsic worth of the individual and a recognition of that worth through the form of individual rights. See, eg Jerome Shestack, "The Philosophical Foundations of Human Rights" in Janusz Symonides ed, *Human Rights: Concepts and Standards* (Ashgate & UNESCO Publishing 2000) at 31-61.

63 [1998] 1 SLR 943.

64 [1998] 1 SLR 943 at 965, para 56D.

65 [1988] 1 SLR 943 at 965 para 56 D-E (emphasis added).

parliamentary debates revolving around proposals to expand the facilities for overseas voting through amending the Parliamentary Elections Act.[66]

NCMP JB Jeyaretnam[67] argued before Parliament that excluding certain overseas Singapore citizens from the category of overseas voters could be unconstitutional, presumably for violating the Article 12 equality clause, although this was not pursued. The parliamentary debates sparked off discussions as to the nature of the right to vote, whether it was a "right", a "duty" or "privilege".[68]

Confused meandering over nomenclature aside, the debate resulted in an interesting pronouncement by the Attorney-General who advised the Home Affairs Minister that the right to vote in an election was implied in the Constitution. The Minister stated:

> We have a parliamentary form of government. The Constitution provides for a regular General Election to make up a Parliament, and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right.[69]

This is an interesting development and potentially opens the gateway for the finding of other implicit fundamental constitutional rights that may be implied from the constitutional structure and the Singapore variant of the Westminster system of parliamentary government. It recognises that not every aspect of constitutional process or rules are captured by a text but nevertheless, still exist and operate. For example, although the constitution does not expressly provide for judicial review or a right of access to a

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66 (Cap 218). New Section 13(A) defines the class of "overseas electors" which includes members of the Singapore Armed Forces and public officers in full-time service outside Singapore. Ultimately, the government decided not to allow overseas polling for the 2001 General Elections owing to the security threats extant in the aftermath of the 9-11 terrorist attacks in the US: see *Statement From the Prime Minister's Office: Overseas Voting, 29 September 2001, available at* http://www.elections.gov.sg/EDpress/press2909.html *(accessed 22 May 2002).* See also Parliamentary Elections (Temporary Suspension of Overseas Voting) Act (No 45 of 2001).

67 NCMP Jeyaretnam, who breached the PAP monopoly in 1981 when he won Anson ward lost his NCMP seat in July 2001 after being declared a bankrupt owing to his inability to pay defamation damages: "Jeya vows to carry on in politics" *The Straits Times* (17 August 2001) at H3; "Future of Workers' Party in jeopardy now JBJ is bankrupt" *The Straits Times* (2 August 2001) at H7.

68 *Singapore Parliament Reports* Volume 73, 16 May 2001, "Is Voting a Privilege or a Right" Col 1722.

69 "Kan Seng clears the air on votes" *The Straits Times* (17 May 2001) at H13; *Singapore Parliament Reports* Volume 73, 16 May 2001, "Is Voting a Privilege or a Right'' Col 1726.

judicial remedy, this latter power has been exercised and accepted in practice.[70]

This approach would also support a robust reading of principles not explicitly articulated in the constitutional text[71] or the finding of constitutional conventions in the process of constitutional interpretation. This is consonant too with the approaches of the Privy Council in various decisions relating to Westminster constitutions from various Commonwealth jurisdictions in relation to principles and legal concepts not expressly stated in a constitutional text. Despite textual silence, the Privy Council still found that ideas like the separations of powers and an understanding of "law" as referring to a system that respect "fundamental principles of natural justice" were integral parts of the constitution. This was because they historically existed and were accepted prior to the coming into force of these constitutions and were assumed to continue to operate and inform the legal order.[72]

Nevertheless, it is to be hoped that to fully vindicate and buttress the idea and reality of representative democracy, the right to vote will be elevated to an explicit constitutional right. Of course, this might cause complications for the current electoral system which is organised around a dual single member (Single Member Constituency) and multi-member ward

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70 Article 93 merely vests judicial power in the Supreme Court.

71 There is precedent for this non-textualist approach in the judgement of Chan J in *Cheong Seok Leng v PP* [1988] 2 MLJ 418 where the learned judge declared that the Singapore constitution was implicitly structured on the basis of the separation of powers principle extant in Westminster modelled constitutions. But see the admonitions against "adventurous extrapolation" by Yong CJ in *PP v Mazlan bin Maidun & Anor* [1993] 1 SLR 512 at 516C-D and his contradictory non-textualist approach in *Colin Chan v PP* [1994] 3 SLR 662 at 684F. Here, the "sovereignty, unity and integrity of Singapore" was declared to be the "paramount mandate" of the Singapore constitution, in justifying the curtailment of Jehovah Witnesses' religious liberties in relation to the "fundamental tenet" of compulsory military service in Singapore which is governed by the Enlistment Act (Cap 93).

72 In *Liyanage v The Queen* [1967] 1 AC 259 at 287, Lord Pearce noted that despite the lack of express mention of judicial power in the Sri Lanka Constitution, "the Constitution's silence as to the vesting of the judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislature". In *Ong Ah Chuan v PP* [1981] 1 MLJ 64 at 71B-D, the Privy Council noted of the meaning of the word "law" in Article 9 and 12 of the Singapore Constitution: "In a constitution founded on the Westminster model and particularly in that part of it that purported to assure to all individual citizens the continued enjoyment to fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law', and the like, referred to a system of law which incorporated 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."

(GRC) system. Presumably, a constitutional right to vote must be predicated on the principle of equality, the idea that all men are equal and when it comes to the task and right of choosing one's governors, all men should have an equal say.[73] As it currently stands, a voter in a single member ward has one vote which sends on candidate into Parliament; a voter in a GRC ward, where between 4-6 candidates are fielded as a team, has a single vote which translates into the election of 4-6 parliamentarians. Thus the disparity in voting *power* is apparent and on the face of it, clearly violates Article 12. An otherwise unconstitutional electoral system has been rendered constitutional by the deployment of a notwithstanding clause in Article 39A(3) of the Constitution which immunises legislation from unconstitutionality even where contrary to Article 12 or constituting an otherwise impermissible "differentiating measure" under Article 78.

It is also interesting to note that judges in other common law jurisdictions[74] like England, Australia and physically closer to home, Malaysia, are developing a jurisprudence that is progressive in drawing upon principles and normative theory to find or proclaim rights not explicitly enumerated in a constitutional or statutory text. They are also declaring rights from constitutionally open-ended protections of "personal liberty". This could have implications for the development of a theory of constitutional interpretation in Singapore which goes beyond the pale of positivist formalism by a liberal elaboration of the content of rights in the constitutional text or derived from common law values and principles.

For example, Laws J in *R v Lord Chancellor, ex p Witham*[75] found that though not expressly enacted, there was a constitutional right to seek a judicial remedy. Parliament, being sovereign, could only limit this right through a clearly worded ouster clause. Laws J noted that:

> The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a

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[73] Notably, the merits of the "one man one vote" or simple plurality system has been questioned by senior government officials, most notably, former Prime Minister Lee Kuan Yew who proposed a "Some Men Two Votes" system: "SM Lee: Why some Singaporeans should have more than one vote" *The Straits Times* (8 May 1994) at 22. See also Thio Li-ann, "Choosing Representatives: Singapore Does It Her Way" in Hassall & Saunders eds, *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (St Leonards, NSW, Australia: Allen & Unwin, 1997) 38-58 at 57.

[74] See Sir John Laws, "The Constitution: Morals and Rights" [1996] Public Law 622; "Law and Democracy" [1995] Public Law 72; "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] Public Law 59; HP Lee, "The Australian High Court and Implied Fundamental Guarantees" (1993) Public Law 606-29.

[75] [1997] 2 All ER 779.

> constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it… do we [in England] have constitutional rights at all?
>
> In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.[76]

After reviewing the authorities, Laws J found that "the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means".[77] The English Parliament could, through an ouster clause, prevent a person from going to court to seek a judicial remedy, thereby qualifying the exercise of this acknowledged "constitutional right".

In considering this very issue in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*,[78] the Kuala Lumpur Court of Appeal found that the situation in Malaysia differed from that in England for various reasons. First, unlike England, Malaysia had a constitution that was supreme which the Federal Court was charged with interpreting. Hence, it was a cardinal constitutional principle that the citizen should turn to the courts "to enforce rights conferred by the Federal Constitution or other written law or existing at common law".[79] The Malaysian Court of Appeal approvingly cited several Indian cases which affirmed that "judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away".[80] It was deemed essential to the rule of law. The liberal approach of the Indian courts towards interpreting "personal liberty", safeguarded in Article 5 of the Malaysian constitution, was approved. Hence, the liberty of an aggrieved person to go to court to seek a remedy, including judicial review of administrative action, was one of the many facets of "personal liberty". In finding a fundamental liberty of free access to an independent

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76 [1997] 2 All ER 779 at 783-784.

77 [1997] 2 All ER 779 at 787.

78 [1998] 3 MLJ 289.

79 [1998] 3 MLJ 289 at 306A-B.

80 Bhagwati CJ in *Sampath Kumar v Union of India* AIR 1987 SC 386 at 388 explaining the effect of *Minerva Mills Ltd v Union of India* [1981] 1 SCR 206 (AIR 1980 SC 1789), discussed at [1998] 3 MLJ 289 at 306-307.

judiciary to obtain redress, the Malaysian court made concrete a specific aspect of the express right to "personal liberty" and thereby strengthened the arsenal of protected individual liberties.

In relation to the suitability of borrowing from Indian jurisprudence, the Malaysian Court noted that

> [t]he views expressed in the foregoing cases are not only entitled to great weight but may be safely adopted by our courts. Apart from being plain common-sense, they were made in respect of a written constitution the basic fabric of which resembles that of our Federal Constitution.[81]

This is instructive because although the Singapore High Court has expressed caution towards foreign cases pursuant to its "four walls" theory,[82] the Singapore constitution was cut from the same cloth as the Malaysian constitution, which was itself inspired by the Indian constitution.[83] The Malaysian approach in developing a robust notion of "personal liberty", which is guaranteed in Article 9 of the Singapore Constitution has much to commend it and is a possible route for future principled developments in the local context. It may also be noted that the proposal of the 1966 Wee Commission to have a new article empowering individuals to seek a judicial remedy to redress violations of their fundamental liberties was unfortunately not adopted. It is, however, open to Singapore courts to infer this through a purposive interpretation of "personal liberty" in Article 9 or alternatively, to ground it in the fundamental and essential principle of the rule of law.

It may be objected that the Singapore High Court has rejected the basic features doctrine as propounded by the Indian Supreme Court in *Kesavananda Bharati & Ors v The State of Kerala*[84] in *Teo Soh Lung v Minister for Home Affairs*[85] (while curiously applying it!).[86] Further, that

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81 [1998] 3 MLJ 289 at 307H-I.

82 Yong CJ in *Colin Chan v PP* [1994] 3 SLR 662 approvingly cited the approach stated in *Government of the State of Kelantan v Government of the Federation of Malaya & Anor* [1963] MLJ 355 to the effect that "... the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."

83 The High Court in *Colin Chan v PP* [1994] 3 SLR 662 at 681G also stressed the importance of basing decisions on "local conditions" though this important qualifying factor has not been developed to any sophisticated degree. Presumably, these local conditions must include reference to cultural or "Asian values". Like Singapore, Malaysia has also been an advocate of the Asian values school of thought in international human rights discourse. See Antony J Langlois, Ch 1 (The Asian Values Discourse) and Ch 2 (The Real Asian Values Debate) in *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (New York: Cambridge University Press, 2001)

84 AIR 1973 SC 1461.

85 [1989] 2 MLJ 449.

86 Strangely, after FA Chua concluded that the basic features doctrine was not applicable to the Singapore Constitution, one of the difficulties being to identify such un-enumerated

the methodology it entails, that of identifying unwritten principles embedded in a constitutional order, gives rise to subjectivity as a basic feature such as secularism or democracy is not value neutral but tied to a political ideology, is undesirable. This need not necessarily be the case as it is possible to embark upon a principled exposition of how an espoused background political theory, which shapes the legal order and culture, might be effectively realised in terms of rights, institutions and processes promoting its values. One might infer that the learned Attorney-General's opinion that there was an implicit right to vote in the Singapore constitution was based on two pillars: firstly, that historically, this was a "given" in polities which identified themselves with representative democracy, which the Westminster constitution is predicated upon. Voting may be deduced as integral to the democratic process, indeed, "basic" to it. Secondly, that the political ideology of representative democracy, as opposed to other ideologies like Communism, continued to be desirable in independent Singapore and should be affirmed and vindicated in the contemporary setting. One way would be to recognise the primary importance of the right to vote through acknowledging its constitutional status.

C. *Women's Rights, Wrongs and Rights Discourse in General*

Singapore does not as yet have a developed "rights culture", in the sense that potentially justiciable claims are not often articulated before the courts as rights violations.

One clear example relates to issues of gender inequality, which the Constitution does not expressly prohibit. Article 12(1) provides that: "All persons are equal before the law and entitled to the equal protection of the law". However, no challenges framed in terms of the contravention of this constitutional safeguard in the form of test cases have been levied against various legislative policies which negatively discriminate against women. Two prominent examples periodically raised in Parliament for discussion relate to the non-extension of health care benefits of female civil servants to their dependants.[87] It may be that the reason is because there are expressed cultural views, which may well be out-moded and irrational given the high percentage of women in the workforce, that men are considered the main

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features, he went on to assert that "none of the amendments complained of had destroyed the basic structure of the Constitution". This assumes that there is a "core" content or traits that can be identified with the Constitution's basic structure: [1989] SLR 499 at 514H-I.

[87] In November 1993, Mrs Yu-Foo Yee Shoon raised this issue in Parliament and the Finance Minister Richard Hu justified the policy on the grounds of Asian family structure: "It is the husband's responsibility to look after the family's needs, including their medical needs. This is how our society is structured. It would be unwise to tamper with this structure": "Women's place in the House" *The Straits Times* (11 December 1993) at 32.

providers for a household.[88] As a female PAP MP noted recently, "our society is still a patriarchal one, I am often reminded".[89] Indeed.

Secondly, the maintenance of a one-third quota on the number of female students admitted to Singapore's only medical school at the National University of Singapore. The reason proffered for this discriminatory practice is because of the heavy government subsidies expended on medical education and the belief that female doctors are more likely to quit active medical practices when they get married and become mothers, thus wasting national resources.

These policies are potentially areas of government policy that need to be re-assessed in the light of Singapore's seminal decision to ratify three human rights treaties in 1995, including the 1979 UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).[90] Treaty obligations include the duty of governments to eradicate through law and other means policies which are gender discriminatory.[91] Of particular note here, in relation to the health benefits policy, is Article 5(a), which enjoins state parties to take "all appropriate measures"

> [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Cultural prejudices must thus be modified in order to promote the treaty's goal of gender parity. Indeed, even the government in its White Paper on

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88 As Madam Haliman Yacob put it in Parliament: "With a high percentage of women now in the workforce - we have two women permanent secretaries, we have many women judges, we have several women lieutenant-colonels - I really don't see why we need to continue with this policy which is quite unsustainable, and the rationale for which is becoming more and more murky as we go on": "Equal medical benefits for women needed: Call made by women MPs to make 'overdue' change to the policy" *The Straits Times* (13 May 2002) at H2.

89 Irene Ng, *Singapore Parliamentary Reports*, 5 April 2002, Volume 74 Column 602.

90 GA res. 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981. The other two treaties are the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force 12 January 1951 and the 1989 Rights of the Child Convention GA res 44/25, annex 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990. Singapore's reservations may be accessed through the UN High Commissioner on Human Rights' web site at http://www.hri.ca/fortherecord2001/documentation/reservations/cedaw.htm. Notably, Finland, the Netherlands, Norway and Sweden made declarations objecting to Singapore's reservations.

91 Articles 2, 4, 5 of CEDAW. For an analysis of the potential impact of the treaty on Singapore public law, see Thio Li-ann, "The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW" [1997] 1 Sing JICL 248. See also Dana Lam-Teo, "Gender Discrimination still exists in S'pore", Forum *The Straits Times* (26 January 200) at 33.

Shared Values[92] which expressed what it considered to be national values acknowledged that Confucianism, its preferred ideology, needed modification as it had "no monopoly of virtue…[and needed to be] brought up to date and reconciled with other ideas which are also essential parts of our ethos."[93] Specifically:

> Traditional Confucian family relationships are strictly hierarchical. Sons owe an absolute duty of filial piety and unquestioning obedience to fathers. Males take precedence over females, brothers over sisters and the first born over younger sons. But in Singapore, the parent-child relationship is more one of respect rather than absolute subordination. Sons and daughters are increasingly treated equally. The relationship between older and siblings is less authoritarian.[94]

It is well that the noxious nature of these sexist, inegalitarian cultural values be firmly rejected but CEDAW urges states to take a pro-active approach towards modifying such biases in both the private and public sector.

The CEDAW treaty is overseen by a Committee in New York and Singapore is obliged to present periodic state reports on its compliance with its treaty obligations. Although there is an Optional Protocol to the treaty, which allows aggrieved individuals to bring communications of alleged breaches of CEDAW before the Committee, Singapore has as yet not bound herself to this stronger form of enforcement.[95] Singapore presented its initial and second periodic state reports before the CEDAW committee in July 2001.[96] Interestingly, it reported that the government was considering the

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92 Cmd 1 of 1991, ordered to lie on the table.

93 Para 42, *Shared Values White Paper*.

94 Para 44, *Shared Values White Paper*.

95 GA res 54/4, annex, 54 UN GAOR Supp (No 49) at 5, UN Doc A/54/49 (Vol I) (2000), entered into force 22 December 2000. The CEDAW Committee can only consider communications and transmit recommendations to state parties allegedly in breach of CEDAW provisions. The success of this facility rests heavily on the good faith of the state party to bring its domestic laws into conformity with its international obligations. Singapore has also lodged a reservation against Article 29 of the Convention which provides that states between state parties in relation to the convention should be submitted to arbitration or the International Court of Justice.

96 These reports were presented by Mrs. Yu-Foo Yee Shoon, Senior Parliamentary Secretary of the Ministry of Community Developments and Sports (MCDS) and are available on the MCDS website at http://www.mcds.gov.sg. Commenting on these reports, a local woman's organization, Association of Women for Action and Research (AWARE), has suggested that Article 12 of the Constitution be amended to include gender among the list of grounds upon which discrimination is prohibited. This would be consonant with Article 2(a) CEDAW under which States undertake to embody the principle of gender equality in their national constitutions or legislation. The CEDAW Committee's comments on Singapore's reports may be found in *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Singapore*, 3 July 2001 at A/56/38 paras 54-96. This is available at the webpage of the UN High Commissioner on Human Rights at http://www.unhchr.ch.

ratification of International Labour Organisation Convention 100 on Equal Remuneration which aims to ensure equal pay for equal work, on the basis of performance and meritocracy rather than gender. This would certainly be a progressive and commendable step.[97] In the same vein, the CEDAW Committee noted approvingly the gender-neutral steps adopted in the government's consideration of extending child sick leave provisions to fathers who work as civil servants.[98]

The resilience of cultural particularities, as justification for derogating from international law norms through the facility of treaty reservations, is also evident in the report though. Currently, contrary to Article 9(2) of CEDAW,[99] children born outside Singapore of a Singapore mother and non-citizen father do not automatically have Singapore citizenship; the converse is not true. This disparate treatment is justified on the basis of the need to ensure that immigration policy "remains in line with our Asian tradition where husbands are the heads of the households".[100] The Committee in its Concluding Observations recommended amendments to Singapore's nationality laws.[101]

In January 2002, the Health Ministry announced that it was willing to review the quota on women doctors. Interestingly, the discussion was not phrased in terms of acting to conform to the requirements of Article 12 or Singapore's international obligations under CEDAW (that is, in terms of "rights" or justiciable entitlements).[102] It was phrased purely as a policy matter, maximising government discretion to act as it thinks expedient in

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97 Para 7.3-7.4, Singapore's *Second Periodic Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination against Women*, Ministry of Community Development and Sports, Republic of Singapore (April 2001).

98 Para 70, *Concluding Observations of the CEDAW Committee*, A/56/38.

99 This grants women equal rights with men with respect to their children's nationality.

100 See Article 122(1), Constitution. See also para 2.3 of Singapore's *Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination against Women*, Ministry of Community Development, Republic of Singapore (January 2000) CEDAW/C/SGP/1. The CEDAW Committee at para 79 of its Concluding Observations, (A/56/38) expressed concern that "the concept of Asian values regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women."

101 Concluding Observations of the CEDAW Committee, A/56/38. The Commitee noted at para 75 that "[t]he explanation that a Singaporean woman cannot transfer nationality to her child when a marries a foreigner and the child is born overseas, since dual nationality is not recognized, is unconvincing. The Committee wishes to point out that since both mother and father can transfer nationality to children born within the country in many countries, including Singapore, the same problem can arise with respect to the children born of Singaporean men and foreign women."

102 The CEDAW Committee expressed concern about the quota system and urged the Government to remove this quota and provide childcare arrangements and flexible working hours so as to encourage and enable women doctors to pursue their profession: paras 92-93, Concluding Observations, CEDAW Committee, A/56/38.

the matter, rather than in active vindication of a right to equality.[103] Similarly in May 2002 when MP Madam Haliman Yacob called in Parliament for the dependents of women civil servants to be given the same medical benefits as their male colleagues,[104] the reply was that through another medical scheme, women's medical benefits had "effectively been aligned" with those of men.[105] Nevertheless, because the policy on the books can send out a negative signal in relation to the government's view on women, which greatly influences public perception, this "old ghost" should be firmly exorcised through modifying the policy such that it both formally and substantively vindicates women's equality in this respect.

D. *Public Order Imperatives: The Post 9-11 Political Landscape: Terrorism Threats, Racial Tensions and Security Concerns*

Security and racial-religious harmony concerns have assumed centre-stage in domestic politics in the aftermath of the detention orders issued under the Internal Security Act (Cap 143), invoked in December 2001, shortly followed by the *tudung* controversy. These have raised important constitutional issues relating to Religion-State relations and the need to balance order and liberty in the face of security threats which implicates the public order, the pre-requisite for the enjoyment of fundamental liberties.

In the aftermath of the 9-11 terrorist attacks in the United States, issues relating to the imperative of securing national security have assumed priority globally, raising concerns that measures to ensure public safety may will entail the erosion of civil liberties. In a display of solidarity with the international community's efforts to combat the scourge of international terrorism, Singapore adopted the United Nations Act (No 44 of 2001) which was designed to enable Singapore to fulfil her obligations with respect to Article 41 of the United Nations Charter. This relates to binding Security Council decisions to adopt non-military sanctions in relation to situations posing a threat to international peace and security.

In December 2001, Singapore invoked the Internal Security Act (Cap 143A), a bequest of British colonialism, which authorises issuing preventive detention orders against individuals who are considered to pose a threat to public order. These orders are not reviewable except on procedural grounds,

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[103] "Health Ministry willing to relook quota on women doctors" *The Straits Times* (19 January 2002) at 5.

[104] "Equal medical benefits for women needed: Call made by women MPs to make 'overdue' change to the policy" *The Straits Times* (13 May 2002) at H2. Notably, of the four MPs who initially backed the call, three were women, joined by one enlightened male, Associate Professor Chin Tet Yung (Sembawang GRC). He was later joined in this enlightened perception that women's concerns were not the exclusive province of the female gender by his fellow GRC team-mate, Dr Mohammed Maliki Osman: "Health care benefits also for women's dependants" *The Straits Times* (15 May 2002) at H3.

[105] "Health care benefits also for women's dependants" *The Straits Times* (14 May 2002) at H3.

owing to an ouster clause introduced in 1989 to limit the scope of judicial review.[106] Fifteen people suspected of belonging to a fundamentalist Islamic terrorist group, the Jemaah Islamiah (JI), were detained. Thirteen of them were suspected of being cell members of a clandestine organisation having links with Al Qaeda and its leader, Osama bin Laden. Evidence in relation to a plot to bomb the Yishun Mass Rapid Transit system was uncovered. The last time the Internal Security Act was invoked on a similar scale was in conjunction to what was characterised as the "Marxist conspiracy" in 1988.

Under the Act, an Advisory Board, in this case headed by Judge Chao Hick Tin, must review the cases of these suspected terrorists within three months, to examine the evidence upon which the detention order is based. Hearings commenced in February 2002. Detainees have a right of representation before the Board, whose meetings are held in camera.[107] If the Board recommends the release of the detainees, the government can only continue to hold them in detention with Presidential concurrence and subject to regular two yearly reviews. Although the government is not obliged to disclose information upon which the detention orders are based, it decided to release video clips taken by JI members in January 2002. These were reconnaissance clips taken of strategic locations like the American Embassy, the British and Australian high commissions and these recordings were made sometime in October 2001.[108] This allows for some measure of accountability and to allay public fears and concerns.

The arrest of these 15 members of an Islamic fundamentalist group has caused disquiet among the minority Malay/Muslim community in Singapore, which constitutes about 15% of the 3.2 million population, with 75% belonging to the dominant Chinese race. The government is obliged by virtue of Articles 152 and 153 of the Constitution to safeguard the interests of religious and racial minorities and safeguard the "special position of Malays" as the indigenous people of Singapore.[109]

The government, concerned about the erosion of racial solidarity, has been at pains to stress that the detentions are not based on religious factors and that the detainees were "mere foot soldiers of foreign masterminds".[110]

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[106] Section 8A-D, Internal Security Act (Cap 143).

[107] Home Affairs Ministry response to media queries: "Advisory Board to review detainees cases" *The Straits Times* (19 January 2002) at H10. A White Paper detailing the investigations of the Internal Security Department into the terrorist network that was plotting attacks on American interests here will also eventually be made available to the public: "Report on ISD probe will take time" *The Straits Times* (21 January 2002) at H4.

[108] "More videotape evidence of terror plot here" *The Straits Times* (2 March 2002) at 3.

[109] For example, the Administration of Muslim Law Act (Cap 2) provides that *syriah* law governs issues relating to personal law and testamentary disposition. See also Singapore's reservations to CEDAW in relation to safeguarding religious autonomy.

[110] "Security, harmony, the main worry now" *The Straits Times* (11 February 2002) at 4. For the full text of the PM's Chinese New Year Message, see "Now is the time for moderates to speak up" *The Straits Times* (11 Feb 2002) at 11.

Hence, the issue has been one characterised as having transboundary implications, rather than being a localised issue. This is evident from the government's declarations that the JI detainees were not representative of the Muslim community, which had condemned their motives and action, nor were they products of *madrasahs* (religious schools).[111] This was designed to diffuse fears that the minority Muslim community would be viewed with "irrational" suspicion, undermining racial harmony, the maintenance of which has been a perpetual concern within the multi-cultural setting of Singapore, since it achieved independence in 1965.[112] In a placatory gesture, the media also reported that the JI detainees were being co-operative, were allowed to fulfil their religious duties and enjoyed weekly familial visits.[113] Furthermore, government ministers were holding closed door sessions with community and religious leaders to address public concerns over the arrests.[114]

The sensitivity of racial and religious issues in a multi-cultural society like Singapore came to the foreground when the owner of a website called Fateha.com began to express what the government considered to be extremely divisive views that criticised the Singapore government's support for the US' campaign against terrorism.[115] The owner, a Mr Zulfikar Mohamed Sharif, who claimed that the Malay PAP MPs did not represent grassroots sentiments has been reported as saying "Osama bin Laden is a good Muslim, better than our Malay leaders in Singapore".[116] This has been rejected by Muslim PAP MPs who have dismissed as presumptuous Mr Zulfikar Sharif's claim to be the genuine spokesman of the Malay community.[117] At the very least, this shows the diversity of views within

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[111] A subsequent poll conducted by The Straits Times seemed to indicate that most Singaporeans supported the government's support of the US-led war against terrorism as being a legitimate war and that the majority of Muslims were against terrorism. A small minority of Muslims might be sympathetic to the terrorists who are Muslims, according to the Secretary-general of the Islamic Fellowship Association: "Knowing One Another", Editorial *The Straits Times* (23 February 2002) at 24.

[112] This may be reflected in initiatives to protect minority interests in the form of the Presidential Council for Minority Rights and the GRC scheme which seeks to ensure a multi-racial component in Parliament.

[113] "ISA detainees cooperative, coping well" *The Straits Times* (24 January 2002) at H4.

[114] "Ministers hold sessions on ISA arrests" *The Straits Times* (25 January 2002) at H5; "Don't view Muslims with suspicion…carry on life as before" *The Straits Times* (1 February 2002) at H10.

[115] "Leaders warn against fringe groups" *The Sunday Times*, Singapore (20 January 2002) at 1. Schools were also given guidelines in how to discuss the arrests with students: "Schools get guide on ISD arrests" *The Straits Times* (13 January 2002) at H1.

[116] "Leaders warn against fringe groups" *The Sunday Times*, Singapore (20 January 2002) at 1.

[117] Muslim MP Mr Yatiman Yusof, Senior Parliamentary Secretary (Information, Communications and The Arts) has questioned Mr Zulfikar's motives as acting against Singapore's interests, pointing out that while Muslims MPs did not represent every Muslim in Singapore, Malay MPs had for 40 years worked to establish the Syriah Court, Mendaki (a self-help group), mosques, as well as administering the collection of tithes, *zakat* and managing the *haj* pilgrimmage. "Leaders warn against fringe groups" *The Sunday Times*,

one ethnic community in multi-cultural Singapore, demonstrating that not all views are represented within Parliament.[118]

While free speech is constitutionally guaranteed in Singapore, subject to broadly drafted and broadly construed restrictions,[119] it must be noted that "hate speech" or speech that tends to provoke racial disharmony and public disorder is subject to legislative limits. This is in the interests of maintaining public order, to which the courts tend to accord paramountcy.[120] The Penal Code criminalises such speech and other laws like the Maintenance of Religious Harmony Act (Cap 167A) allows the minister to issue restraining "gag" orders against religionists seeking to mix politics and religion. The expression of divergent, highly politicised views within the Malay community only fuelled the current national obsession with issues of racial-religious harmony.[121] This was further heightened as a result of a further controversy with respect to religious freedom rights and state educational policy, that is, the *tudung* controversy.

E. *Of Turbans and Tudungs: Minority Concerns, Religious Liberty and the Parameters of the Common Domain*

Further attention was focused on majority-minority race relations through the *tudung* controversy, which crystallised when four primary schoolgirls were suspended from attending their public schools around late January and early February 2002 as wearing the *tudung* (Muslim headscarf)[122]

Singapore (20 January 2002) at 1. Other Muslim organisations have also been critical of Fateha: "Muslim groups slam Fateha" *The Straits Times* (22 January 2002) at 1. See also, "Muslims here reject Fateha chief's remarks" *The Straits Times* (24 January 2002) at 1. Seven members of Fateha's working committee later resigned to disassociate themselves from Zulfikar Mohamed Shariff (former Fateha chief) remarks: "Fateha breakup shows extremism not supported" *The Straits Times* (27 January 2002) at 1.

118 "Who should lead Muslim S'poreans?" *The Straits Times* (28 January 2002) (Lexis).

119 Thio Li-ann, "An i for an I: Singapore's Communitarian Model of Constitutional Adjudication" (1997) 27 Hong Kong Law Journal 152-186; "Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam" [1997] Sing JLS 240-290.

120 *Colin Chan v PP* [1994] 3 SLR 662 at 684F and 678B.

121 Notably, the Singapore Broadcasting Authority (SBA) regulates internet websites which are subject to the SBA's Code of Practice, which would be breached by the dissemination of information which was deemed contrary to the public order, public interest or national harmony. To ensure a degree of accountability for views disseminated, website providers hosting sites that expressed political views have to be registered though this does not itself preclude expression of these views. In this respect, the government expressed its view that the views propagated by what it has characterised to be a fringe Muslim group, Fateha, were political and would undermine inter-community solidarity. 13 members of Fateha had been detained in conjunction with the terrorist plot under the ISA: "Leaders warn against fringe groups" *The Sunday Times*, Singapore (20 January 2002) at 1.

122 Sharon Siddique, "Islamic dress put in perspective" *The Straits Times* (20 February 2002) (available on Lexis, accessed 22 May 2002). This discusses the origins of the *tudung*, being a means of demonstrating religious piety, rejecting Western fashion and culture bound ideas of traditional Muslim dress.

contravened the Ministry of Education's policy on uniforms.[123] While this policy does not expressly list prohibited dress items, it requires that students refrain from wearing anything not forming part of the official school uniform.[124] The parents of the suspended schoolgirls have expressed their view that this policy is unconstitutional and violates the Article 15 religious freedom clause.[125] They have engaged the services of a well-known Malaysian lawyer and politician, Karpal Singh.[126] While preferring that the matter be solved quietly through dialogue and negotiation rather than before the adversarial, public forum of a court, the government has intimated that they would abide by the judicial decision if this course of action is sought.[127]

The constitutional issues raised by this incident are justiciable and certainly, the problem of delimiting the scope of religious expression, particular allowing religious symbols in secular public educational institutions, is one of paramount importance to a multi-religious and multi-cultural society like Singapore. It is also an issue that is grappled with in many other jurisdictions.[128] A detailed treatment of this issue will be made

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[123] Prior to the suspension, the parents had been counseled for a month by the schools involved and later received written notice of suspension for non-compliance with the educational policy: "PM firm on tudung issues" *The Straits Times* (3 February 2002) at 1.

[124] Section 61, Education Act (Cap 87).

[125] "Third tudung girl suspended" *The Straits Ti*mes (12 February 2002) at H3.

[126] "Karpal to file papers for S'pore tudung case" *The Straits Times* (20 April 2002) at H4. See also "DAP urges Singapore to rescind school tudung ban" *New Straits Times*, Malaysia, (1 February 2002) (available on Lexis, accessed 24 May 2002).

[127] "'Muslims urged to discuss tudung issue: Legal action is not the way to resolve matter,' says MP Zainul Abidin Rasheed, adding 'it's better to have more dialogue'" *The Straits Times* (28 January 2002) (available on Lexis, accessed 22 May 2002). The Prime Minister has indicated that he would not mind if the parents of the suspended schoolgirls took the case to court: 'Let them take it to court and let them argue the legal rights and wrongs about the case, and let the court decide'. "PM Firm on Tudung Issue" *The Straits Times* (3 February 2002) at 1.

[128] A Scottish independent all girls school has lifted the ban of Muslim headscarfs after consulting with the Glasgow *imam* who counseled that Islam taught modesty: "Schools lift Muslim headscarf ban: Craigholme U-turn after Herald told of campaign" *The Herald*, Glasgow (23 March 2002) at 5. In Egypt, a higher constitutional court upheld a ban on wearing an Islamic veil over the face as this was not wanted in Islam, as opposed to fundamentalism, mandated nor did it curtail individual liberty: "Egyptian court backs ban on veils in schools" *The Toronto Star* (20 May 1996) at A10. The French assimlationist policy of banning teenage Muslim girls from wearing headscarves to maintain the principle of secularity in public education has also stirred controversy: "French classroom ban on Muslim headscarf girls" *The Times*, London (7 November 1989) (available on Lexis, accessed 22 May 2002). For recent related jurisprudence of the European Court of Human Rights on this issue, see *Karaduman v Turkey* and *Bulut v Turkey*, 3 May 1993 of the European Commission on Human Rights (Decisions and Reports 74/93). This concerned the upholding of university policy to disallow photographs of individuals wearing Muslim headscarves for diploma purposes. The reasoning was based strongly on the Turkish situation where the state is explicitly secular, with a majority Muslim population and where the risk of fundamentalism is closely regarded. See also *Dahlab v Switserland***,** Application No 00042393/98, a 15 February 2001 decision of the Court about a primary school teacher

at a later date.[129] This section will limit itself to canvassing the range of interests implicated, identifying the constitutional issues raised and the relevant legal framework, and offering some preliminary observations. These issues relate to state-religion relations, religious minority concerns, the scope for a religious presence in public or common spaces and the ambit of religious freedom balanced against other competing considerations.

(i) *The Argument from Religious Freedom*

First and foremost, the argument of the parents of these young schoolchildren is that the "no *tudung*" ban constitutes a denial of the constitutionally guaranteed liberty in Article 15 of everyone to "profess and practise his religion and to propagate it". Although the Singapore court has adopted a narrow definition of "religion", limiting this to a citizen's faith in a personal God,[130] it is clear that Islam certainly is a religion and therefore entitled to Article 15 protection. Indeed, it is the only religion in Singapore multi-faith polity to be expressly mentioned in the Constitution in Article 153,[131] flowing from the government's duty under Article 152 to care for the interests of racial and religious minorities in Singapore.[132]

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who was not allowed to wear Islamic headscarf to class. Available at http://www.echr.coe.int/Eng/Judgments.htm. My thanks to Dr Eva Brems of the University of Ghent for drawing this to my attention.

[129] See generally Cynthia DeBula Baines, "*L' Affaire des Foulards* – Discrimination or the Price of a Secular Public Education System?" (1996) 29 Van J Transnat'l L 303; Dale E Carpenter, "Free Exercise and Dress Codes: Towards More Consistent Protection of a Fundamental Right" (1988) 63 Ind LJ 601; Sebastian Poulter, "Muslim headscarves in school: contrasting legal approaches in England and France" (1997) 17 OJLS 43-74. See Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) at 281-314; *Bhinder v CN*, (1985) 2 SCR 561 for a discussion of restrictions on the expression of religion.

[130] *Nappali Peter Williams v Institute of Technical Education* [1999] 2 SLR 569. The Court of Appeal rejected a Jehovah's Witness argument, that taking the National Pledge or singing the National Anthem constituted religious practices in which he refused to participate, was rejected. The Court held that a system of belief about one's own country did not constitute a religious belief, as the State commanded no supernatural existence in a citizen's belief system. Thus, secular ideologies are omitted from the ambit of "religion".

[131] Article 153 authorises the legislature to make legal provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion.

[132] Specifically, Article 152(2) stipulates that it is the government's responsibility "to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language". Although most members of the Malay community are Muslims, the Constitution does not conflate ethnicity and religion and does not define what it means to be a Malay, unlike the Malaysian constitution: see Article 160 which defines "Malay" as "a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom…".

(ii) *The Argument from Inequality*

The Education Ministry does not impose a blanket ban on religious symbols that students in schools may wear. Christians may wear crosses, which is relatively non-ostentatious. However, the parents of the suspended schoolgirls have cottoned on to the fact that they are discriminated against insofar as the policy is selectively applied. This is because Sikhs are exempted from this policy, being allowed to wear turbans, part of their religious dress, in school. This bespeaks double standards.

This selective application of the common uniforms policy may well contravene Article 12 of the Constitution which guarantees equal protection of the law. It is unlikely to be even able to survive the relatively weak "rational nexus" or "reasonable classification" judicial test of permissible classification[133] as the point of distinction is not based on either principle or sound policy.

The reason for this differentiated treatment is one of the historical anomalies of a young nation.[134] Minister Lim Boon Heng noted that this inconsistent practice could be explained (but perhaps not justified) by the historical fact that Sikhs had been allowed to wear turbans to schools since British colonial times. Nevertheless, the Minister called for mutual accommodation and compromise, pointing out that Sikhs were not permitted to carry ceremonial daggers into school.[135] Pragmatism may be the most judicious and realistic approach in this context, but it cannot provide principled justifications, tending to engender a sense of unfairness.[136]

(iii) *State Policy: The Public Good of Integration and Floodgates Fear*

The government has explained the rationale and justification of the "no *tudung*" ban on two primary bases. First, the espoused goal of the uniforms policy is to promote integration among the different races in Singapore, thus buttressing the paramount goal of national unity.

Public schools constitute a "common space", "…the one arena whose reach is almost universal and where the common experience starts from

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133 *Kok Hoong Tan, Dennis v PP* [1997] 1 SLR 123; *Taw Cheng Kong v PP* [1998] 1 SLR 943; *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

134 "'Common uniform policy strengthens national unity; Govt should not be too hasty to change uniform policy as it helps foster integration', says Yaacob Ibrahim" *The Straits Times* (9 February 2002) at H5.

135 "Ministers call for 'give and take' attitude" *The Sunday Times*, Singapore (17 February 2002) at 26.

136 Typically pragmatic, a *Straits Times* editorial of 5 February 2002 at 14 noting with respect to the Sikh exemption: "Glaring contradiction it may be but, with time, it is likely to recede as fewer and fewer Sikh children now wear the headdress. All can be reconciled in due course".

young and through the formative years".[137] The articulated fear was that allowing *tudung* to be worn might heighten differences in an age of fragile race relations, precipitating social disintegration through the loss of more common spaces. When religious studies were introduced in schools in the 1980s, they were subsequently withdrawn as they were found to have a polarizing effect and encouraged segregation along religious lines.[138] It was replaced with a course on civics. Similarly, rather than focusing on differences, attention should centre on common imperatives such as promoting economic development, the glue of Singapore Incorporated. While it is clear that wearing religious dress is an aspect of religious practice constitutionally protected under Article 15(1),[139] this is not absolute but qualified by Article 15(4) which does not authorize any act "contrary to any general law relating to public order, public health or morality". The integrative goals behind government policy could easily be related to public order as a good, though it has been questioned whether the policy is integrative in effect.[140] As observed by Chagla CJ in *State of Bombay v Narsu Appa Mali*[141] in calling for drawing a clearer distinction between faith and practices, "[i]f religious practices run counter to public order, morality or health…then the religious practice must give way before the good of the people of the state as a whole".

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137 Lim Chee Hwee, Press Secretary to Minister for Education, "Uniform remind students of common ties" Forum, *The Straits Times* (2 February 2002) at 31.

138 "PM firm on tudung issue" *The Straits Times* (3 February 2002) at 1.

139 The UN Human Rights Committee which oversees the 1966 International Covenant on Civil and Political Rights considers that religious practices go beyond observing ceremonial acts and include "the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group". Paragraph 4, Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev 1 at 35 (1994).

140 Many Malaysian politicians and commentators as well as Singapore opposition politicians have suggested that wearing the *tudung* would not cause social disintegration and that the ban was contrary to the policy of compulsory education; conversely, not allowing it may have an alienating effect on the Muslim community and reflected insensitivity and prejudice towards the religious concerns of a minority: "Drop tudung rule, SDP urges" *The Straits Times* (8 February 2002) at H3; "Politicians and groups criticize Spore over tudung" *The Straits Times* (31 January 2002) at A8. Muslims NGO groups have criticized the educational policy as being as "highly undemocratic and discriminatory" as well as a clear violation of Article 18, Universal Declaration of Human Rights (1948). The last assertion is overly simplistic, given that Article 29 qualifies the freedoms codified in the UDHR. It has also been argued that changing the policy would promote tolerance, enhance the appreciation of racial-religious diversity and perform the educative function of demonstrating that being a Muslim is not synonymous with being a terrorist: "Tudung or not tudung" *The Nation* (13 February 2002) (available on Lexis, accessed 22 May 2002); "Tudung's a mark of difference, not subversion" *New Straits Times*, Malaysia, (5 February 2002) at 10.

141 AIR [1953] Bom 84.

This stream of reasoning was affirmed in *Colin Chan v PP*.[142] It was acknowledged too in the Malaysian case of *Halimatussaadiah v Public Service Commission, Malaysia & Ors*[143] that the religious practice of wearing a *purdah* or face veil could be limited by virtue on Article 11(5) considerations, in this case, public security. Notably, the wearing of the *purdah* was considered to be a matter of custom rather than religious stipulation.

The idea of a common space also connotes a corresponding separate domain and this is well-accepted in minority rights discourse. Minorities desire to ensure the safeguarding of their group identity and autonomy while also being able to effectively participate in the larger socio-political order. As Prime Minister Goh noted:

> …[W]e want integration, not assimilation. Integration is a gradual continuous process. We want to bond the different pieces of mosaic together. Bonding is the result of mutual trust and understanding. The process cannot be forced...[144]

In a rejection of culinary metaphor, the Prime Minister has referred to Singapore not as an American "melting pot" which submerged differences, nor a "salad bowl" where the pieces remain aloof but in the same bowl. He has deployed the idea of Singapore national identity as being akin to the different communities being "mosaics which form a harmonious whole, with each piece retaining its own colour and vibrancy".[145] Ethnic group concerns about language and culture thus had to be pursued "within the larger canvass of Singapore nationalism", which contemplated cultural diversity as being integrated to social order, a pre-requisite for economic success.[146]

In its classic statement on the goal of minority treaties, the Permanent Court of International Justice in 1935 noted that dual goals were involved: firstly, to place minorities "in every respect on a footing of perfect equality" with other citizens and secondly, "to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics".[147] Contemporary minority standards at international law also recognize that minority rights must be

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142 [1994] 3 SLR 662 at 684E-G.

143 [1994] 3 MLJ 61 at 70-72.

144 Goh Chok Tong, *National Day Rally Speech* 19 August 2001, Singapore Government Press Release available at http://www.gov.sg/sgip/Announce/NDR.htm.

145 "Media's role in sealing social unity" *The Straits Times* (7 September 1998) at 1.

146 Commentators have preferred the usage of term "pot luck" which imports the sharing of a meal composed of distinct flavours, although it was considered that the current state of multi-racialism in Singapore is best described by "buffet", a group of passive consumers. Koh Buck Song, "Forget about the buffet, try pot luck instead" *The Straits Times* (8 March 1997) at 32.

147 *Minority Schools in Albania*, PCIJ Series A/B No 64 (1935).

exercised within the state context without the impairment of state territorial integrity. This connotes both loyalty to the state which protects the distinct identity and autonomy of the minority group in question.[148] For example, a treaty may recognize that minorities have a right and interest in having their mother tongue taught in schools but also affirms the state's rights to have an official language.[149]

The idea of "managing" competing interests is captured in the idea of the common and separate domain. Within the "integrative" common domain, the civil rights members of minorities and majorities are to be protected equally on the basis of non-discrimination. Both groups enjoy the same associative and participatory rights and can both influence the shaping of common domain values. Given the power disparities, affirmative action would be a permissible technique for achieving factual equality, *eg,* the legislative racial quota embodied in the GRC scheme. In contrast, maintaining a separate domain serves the purpose of creating a "cultural space" where minority group aspirations to preserve their identity and culture can flourish. A system which embodies legal pluralism, such as the recognition of a separate system of personal law governing marriage and testamentary disposition,[150] likewise can serve this end. Of course, the border between these domains is not self-evident and will be delineated by practical realities rather than abstract principle.

Secondly, the government ministers has expressed the fear that if *tudung* wearing was exempted from the uniforms policy, a deluge of claims would ensue. For example, the Seventh Day Adventists had asked the government not to hold examinations on Friday, their Sabbath, or Muslims could demand that girls be segregated from boys in secular schools.[151] A Minister noted that if the Sikh exemption was accepted "as precedent rather than stopping there, then each group will call for more of its own practices to be recognized and taken into consideration."[152]

(iv) *Comment and Analysis: Situation in the Broader Context (Tolerance, Secularism, Pragmatism* et al*)*

The *New York Times* described the act of the parents of the suspended schoolgirls of bringing their children to school clad in *tudung* as "the most potent act of civil disobedience this tightly controlled nation has seen in

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[148] For example, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UN Doc A/47/49 (1993).

[149] See, *eg,* Article 14, Council of Europe's Framework Convention on National Minorities, ETS No 157.

[150] Administration of Muslim Law Act (Cap 2).

[151] "Why 'certain rules' in secular schools must be complied with" *The Straits Times* (6 November 2000) at 40.

[152] "Uniforms a way to stress common ties: Ministry gives parents the weekend to rethink sending daughters to school in headscarves, explains need for rule" *The Straits Times* (2 February 2002) at 1.

years".[153] This policy may be variously characterised as discriminatory, a quashing of cultural identity and the right to be different, a shackling of religious liberty or even a breach of Singapore's obligations under the 1989 Convention on the Rights of the Child.[154] At the heart of it are countervailing considerations relating to a difference of views in how to promote solidarity and avoid polarisation within a multi-cultural order, to make diversity beneficial and not a canker:

> It is not just dealing with a religious issue, but also dealing with a question of racial and religious integration and harmony, and the way we try to bring our children together. Dress and symbols do make a difference, so that is the way the rules are and that is the way it has operated for a long time[155]

On the one hand, coercive assimilation should be avoided; on the other, some degree of mutual accommodation is needed to facilitate the cohesiveness of national society at large. Accommodation is not a precise art and suggests pragmatic flexibility, rather that an exercise based on clearly defined principles. It is shaped by an appreciation of the larger context and its multitudes of perspectives and competing interests.

Rather than insisting upon narrow community concerns, the government has exhorted Muslims to be pragmatic and to adopt an accommodative approach that considers the interests of the community at large. There is some concern that the motive for pressing for change is not borne from a genuine concern for religious exhortations of modesty in female dressing but rather, to make a political statement.[156] The political climate today is also one that is wary of growing fundamentalism and radicalism. The government has always been keen to separate "religion" and "politics" insofar as possible, while recognizing the inevitable overlaps, particularly in matters of conscience like abortion.[157] The intermixing of these two volatile forces may be devastatingly combustive since ethnicity and religion, which inform identity, overlap.

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[153] "By barring religious garb, Singapore dress code alienates Muslims" *New York Times* (2 March 2002) at A6 column 1. See also "In placid Singapore, civil disobedience simmers" *The Christian Science Monitor* (5 February 2002) at 7.

[154] See Articles 14, 28, Convention on the Rights of the Child, UN Doc A/44/49 (1989), entered into force 2 September 1990.

[155] Deputy PM Lee (speaking to reporters at Teck Ghee Community Centre), *The Straits Times* (28 January 2002) at 1.

[156] The Prime Minister had noted of the four parents of the suspended schoolgirls, one was motivated primarily by religious concerns. He had less sympathy with the other three parents whom he felt were impelled by political motives, as manifest in their rudeness towards Islamic religious teachers trying to counsel them and their calling Muslim MPs derogatory names."PM firm on tudung issue" *The Straits Times* (3 February 2002) at 1.

[157] See para 26, Maintenance of Religious Harmony Act White Paper, (Cmd 21 of 1989).

The political idea of the State will compete with other religious and non-theistic ideologies for a citizen's loyalty, though identity today tends to be multi-tier rather than singular.[158] However oppressive totalitarian orders can be both religious and irreligious, and religious freedom can be eroded through both state compulsion and prohibition. For example, the decision of the conservative Islamic PAS political party which governs the Malaysian state of Kelantan to require the depiction of *all* women on public advertisements to be clad in *tudung* is entirely oppressive and intolerant.[159]

Apart from the absolute freedom of conscience and profession, the degree of religious liberty enjoyed must be evaluated in the light of the public order requirements which allow all faiths to peacefully co-exist, to flourish or flounder according to the strength of its tenets and the faith of its adherents.

Singapore maintains a policy of accommodative secularism insofar as the Constitution recognises no official religion and the government states its commitment to essay even-handed, neutral treatment of religions and not to be anti-theistic.[160] The government is not to evaluate the merits of any religion and steps in only where public order, health or morality is impaired, *eg*, when a religion advocates child sacrifice or temple prostitution.[161] The government, scarred by the experience of the 1960s racial/religious riots, is painfully conscious that inter-religious hostility can spring up like an unweeded garden that grows to seed. Thus, it advocates maintaining a sacred-secular divide where possible to preserve racial harmony.[162]

Maintaining religious pluralism within a secular state is not an easy task. Apart from government attitude, religious groups with holistic worldviews must incorporate into this the realities of multi-racialism in an imperfect, fallen world:

> This is notably so of Islam, and is also true for most Christians. It is precisely because more than one faith take such holistic views that they must collide if they all attempt to carry out to the full their respective visions of an ideal society[163]

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158 See Thomas M Franck, *The Empowered Self: Law and Society in an Age of Individualism* (Oxford; New York: Oxford University Press, 2001).

159 "New tudung a must for women on ad hoarding" *The Straits Times* (8 May 2002) at A1.

160 See generally Thio Li-ann, "The Secular Trumps the Sacred: Constitutional Issues Arising out of Colin Chan v PP" (1995) Sing LR 26 at 34-8. See also "Government is secular, not atheistic: BG Yeo" *The Straits Times* (8 October 1992) at 2; Paragraph 5, Maintenance of Religious Harmony White Paper (Cmd 21 of 1989).

161 Of course, holiness and profanity is something the post-modern mind is loathe to distinguish.

162 Overlap is inevitable, particularly as certain religions espouse a holistic view that brooks no separation of the sacred and the secular.

163 Paragraph 25, Maintenance of Religious Harmony Act White Paper, Cmd 21 of 1989.

Spiritual kingdoms may or may not become flesh in a religionist's lifetime, but in the temporal interim, a certain degree of tolerance and respect towards different faiths is needed to ensure the peaceful co-existence of distinct groups within the same polity. This suggests a limit to religious expression and some compromise. As Minister of State Yaacob Ibrahim put it:

> Are we able to contextualize our religious beliefs?...if we Muslims in Singapore do not accept the rational basis of secular society in which we live, and all its implications, then we must expect others to be suspicious of us.[164]

To some measure, the Singapore government has been supportive of the Muslim faith which enjoys allowances not afforded other faiths. For example, aside from funding mosques and subsiding Islamic schools, Muslim civil servants are allowed to take Friday afternoons off to attend Mosque.[165] A separate system of syariah courts have been established under the Administration of Muslim Law Act (Cap 2) to handle personal laws and although Islam mandated practices may be contrary to international human rights law standards, Singapore has appended reservations in ratifying a UN women's rights treaty in recognizing a sphere of cultural or religious autonomy.[166] The prohibition against *tudungs* in public school must be seen in this context: it is limited in time and place and may be worn in the workplace and tertiary institutes. The prohibition is meant to aid the socialization process in school at the formative stage of education where commonalities rather than differences are the focus of emphasis. In other jurisdictions like France where education is secular and compulsory until age 16, religious symbols *per se* are not considered to contradict secularism, insofar as they do not impinge personal safety, prevent participation in physical exercise classes and do not promote ostentatious proselytism.[167] In a sense therefore, the desire to wear *tudungs* in public schools reflects a desire for more religious public space.

The Muslim community appears divided over whether wearing the *tudung* is a mandatory aspect of religious practice or a matter of personal

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[164] Yaacob Ibrahim, Minister of State (Community Development and Sports), "Balancing common and private spaces" *The Straits Times* (15 March 2002) at 27.

[165] Detractors have argued that state funding of religious institutions strengthens state control over the latter: *The Financial Times* (14 February 2002) at 12.

[166] The Singapore reservation to Article 2 and 16 CEDAW states: "In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws." Available at http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm.

[167] "To veil or not to veil" *The Straits Times* (16 March 2002) at 26.

choice insofar as it is more a culturally rooted practice.[168] If indeed a religion requires something to be done, there is a stronger case for allowing this then if that something is merely optional or consonant with certain culture-based practices.[169] The PM reported that he had been informed that it was not obligatory for pre-pubescent girls but his is not the last word on the subject. Indeed, the difficult associated issue that arises is who speaks for the minority Muslim community? A range of voices have sounded their views, including Malay PAP MPs, Islamic religious authorities like MUIS[170]and the mufti[171] who are of the view that pre-teens are not obliged to wear *tudung*. Contrariwise, non-government voices like those behind Fateha have opined that on the *tudung* issue, the government was "forcing Muslims to go against Islam".[172] This demonstrates the difficulty of finding an authoritative representative organ for any community and that even within a single religious group, there is an on-going battle between moderates and extremists.[173] Furthermore, an unheard voice or unarticulated view in the *tudung* debate is the view that the wearing of the *tudung* actually is oppressive, *eg*, Muslim feminist views that seek to change custom from an insider perspective.[174]

Given the lack of consensus on views concerning whether wearing the *tudung* is an obligatory religious requirement, the Prime Minister has urged

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168 "Many views on wearing headscarf: The practice of covering the head stems from cultural and religious backgrounds, and it can be hard to distinguish the two" *The Straits Times* (2 February 2002) at H9.

169 This appeared to have influenced the decision in *Mandla and another v Dowell Lee* (1983) 1 All ER 1062 where a "no turban" rule applicable to a schoolboy was not justifiable within the terms of the 1976 Race Relations Act.

170 MUIS or the Islamic Religious Council of Singapore have advised the parents to send their children back to school *sans tudung* as the government policy is not considered to be restrictive of rights: "Boosting integration in aftermath of tudung row" *The Straits Times* (10 February 2002) at 26.

171 The mufti is the highest Islamic religious authority in Singapore: "Parents should heed Mufti's advice and move on" *The Straits Times* (7 February 2002) at H3.

172 "More ministers attack fringe group's views" *The Straits Times* (21 January 2002) at 1.

173 "Who should lead Muslim S'poreans? It is necessary for the country to have Muslim MPs but they must adopt a national view, speak for non-Muslims too" *The Straits Times* (28 January 2002) at H6.

174 For example, the Spanish Education authority has stated that the wearing of the *hijab hejab* "is not a religious symbol but a sign of discrimination against women", likening it to practices like female genital circumcision which "cannot be understood as a cultural or religious concept, but only as savagery": "Spain split by Fatima's headscarf" *Observer* (Guardian) (17 February 2002) at 24. In Turkey, female politicians have also objected to male traditionalism and have objected when Islamist politicians attended the inaugural 1999 parliamentary session wearing traditional Muslim headscarf: "Young Turk takes on male traditionalists of Islam" *Daily Telegraph*, London, (3 March 2001) at 21. For an Arab feminist's view, see Lama Abu-Odeh, "Post Colonial Feminism and the Veil: Considering the Differences" (1992) 26 New England Law Review 1527 where she describes the *hijab* as both a symbol of oppression and an immediate curative for sexism in Arab society. See also Abdullahi An-Naim, "The Rights of Women and International Law in the Muslim Context" (1987) 9 Whittier L Rev 491.

that the Malay community be pragmatic and focus on other imperatives.[175] Primarily, since Islam advocated a "search for knowledge",[176] the parents involved in the suspension should prioritise their daughters' education.[177] Muslim MPs also urged the Muslim community to be engaged in the wider national project of uplifting the community and participating in national society to promote Singapore's competitiveness.[178]

Furthermore, the Prime Minister stated that although the present time was not ripe for reviewing the policy owing to the heightened sensitivities and suspicions towards the Muslim community in the post 9-11 world, it was not an immutable one. The policy had worked for many years. However, attitudinal changes that come with a mature multi-racial society might warrant reconsideration. The aggressive assertion of identities might also harm Malays in the long term as Chinese companies, when it came to employment, might choose to "leave them alone".[179] This pragmatism bespeaks a managerial or practical approach towards accommodating religious interests in a secular state, rather than one based on principled bright lines.[180]

(v) *Cat Calls Across the Causeway:*[181] *Singapore Swings Away from Malaysian Approach*

The sensitive state of affairs fuelled by the *tudung* controversy was heightened when it began to attract attention from Singapore's neighbours, including Brunei[182] and particularly, Malaysia. This is remarkable in

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[175] "Take practical approach to tudung issue" (Mendaki club dialogue), *The Straits Times* (3 February 2002) at 1. He suggested not making an issue of it at the Primary 1 level, which punished the schoolgirls, and that upon reaching puberty, these girls could be placed in *madrasahs* (religious schools) where the *tudung* could be worn. See also "Malay MPs call for 'careful approach' to tudung issue: While they accept that it is an important issue, they also call on the community to move on to address more pressing concerns" *The Straits Times* (27 January 2002) at 33.

[176] "Muslims urged to discuss tudung issue" *The Straits Times* (28 January 2002) at H5.

[177] "Tudung Issue: Parents urged to put kids first" *The Straits Times* (4 February 2002) at 3.

[178] Haliman Yaacob, "Do not let tudung colour opinion" Forum, *The Straits Times* (12 March 2002) at 22.

[179] "Parents go head to head with PM over ban" *Sydney Morning Herald* (21 February 2002) at 8.

[180] "It's not a never never. But I want to build a successful multi-racial society first. If over time we are all comfortable, as we are with adults wearing tudung, then you will find that our own attitudes ay change": "PM firm on tudung issue: Two Primary 1 schoolgirls will be suspended if they turn up in Islamic headscarves for classes tomorrow" *The Straits Times* (3 February 2002) at 1.

[181] Malaysian PM Mahathir had made (rather undiplomatic and condescending) references to the many ways of skinning a cat and skinning Singapore in the seasonal exercise of calling Singapore names: "Skin the Singapore Cat? Forget it; Singaporeans need not be put off by name-calling, says Jayakumar, but should take such remarks in stride" *The Straits Times*, Singapore (17 May 2002) (available on Lexis, accessed 22 May 2002).

[182] "Brunei sticks its head in scarf row" *Courier Mail* (7 February 2002) at 10. Wearing scarves is mandatory in Brunei.

departing from one of the leading principles and practices of the Association for South East Asian States (ASEAN) to whom all these states belong, not to intervene in the internal affairs of a member state and certainly not to criticise the human rights policies of fellow ASEAN members.[183]

Malaysian politicians began making critical comments about Singapore's discriminatory treatment against the Muslim minority, adopting the typical posture of a "kin" state concerned with the treatment of a "kin" minority (the kinship tie being both ethnicity and religion here) in a neighbouring host state.[184] This is the typical "triadic nexus" that frames the typical minority problem, such as when Germany in the 1930s voiced concerned for the situation of the German minority in Czechoslovakia on the basis of blood ties. This makes for a potentially destabilising situation between states, when the "kin" state asserts an interest, whether legal or moral, in how a host state treats its "kin" minorities. This is exemplified in the statement made by a leader of an Islamic political party in Malaysia, Parti Islam SeMalaysia (PAS) justifying their interest on the basis that "universal elements in Islam have no geographical boundary",[185] asserting some sort of spiritual protectorate. Most Malaysian critics have called for a lifting of the "no *tudung*" ban[186] in the name of religious freedom. PAS has even gone so far as to raise funds for the "*tudung* girls", eliciting criticism from other Malaysian politicians for exploiting the issue to pose as the champions of Islam within Malaysia, where the idea of what an "Islamic state" constitutes is itself in flux.[187]

A reversal of policy on the *tudung* issue would certainly mean the success of the aggressive assertion of religious identity in the public. On this point, it is worth pausing to consider one very important aspect of Singapore identity which distinguishes itself markedly from the Malaysian polity. Although both Singapore and Malaysia have been at the forefront of

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183 See Li-ann Thio, "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep" 2 Yale Human Rights & Development Law Journal 1 (1999) at 1-86.

184 Asad Latif, "Don't let race and religion derail Malaysia-S'pore ties" *The Straits Times* (11 February 2002) at 10.

185 "PAS leader writes to SM Lee on Tudung Issue" *The Straits Times* (6 February 2002) at A7.

186 "Umno Youth claims right to speak on tudung issue" *The Straits Times* (2 February 2002) EAST & SE ASIA (available on Lexis, accessed 22 May 2002).

187 "PAS raises $4700 for tudung girls" *The Straits Times* (23 May 2002) (available on Lexis, accessed 22 May 2002); "KL politicians slam PAS for exploiting tudung issue: OK to oppose S'pore ban on headscarves, they say, but not to raise funds for four suspended pupils challenging ban" *The Straits Times* (24 May 2002) (available on Lexis, accessed 22 May 2002). The hosting of PAS politicians by the ex-Fateha chief on a Singapore visit has also been heavily criticized by the government: "Tudung issue: Not wise to involve outsiders" *The Straits Times* (18 February 2002) (available on Lexis, accessed 22 May 2002); "Outraged Yaacob blasts ex-Fateha chief" *The Straits Times* (24 May 2002) (available on Lexis, accessed 22 May 2002).

the so-called "Asian values" debate that characterises a contemporary strain of culturally relativist arguments in human rights discourse, their differing understanding of "Asian values" demonstrates how this school is not a singular set of values. An important point of differentiation is that Malaysia advocates the need for a revived religious public culture.[188] Singapore, in espousing a principle of secularity framing State-Religion relations[189] when it seceded from Malaysia, where Islam is the official religion of the Federation,[190] does not.

Consequently, Islam has a privileged position in Malaysia, manifested in such rules as law prohibiting the propagation of other faiths to Muslims. It is no wonder that the Singapore *tudung* controversy can be exploited to score political and religious brownie points in Malaysia. Indeed, recent cases would seem to indicate a growing "Islamicization" in court jurisprudence insofar as it is argued that Islam is supreme over other religions, impacting the area of freedom of religion. A recent 1999 case declared that a school lacked jurisdiction to ban students wearing turbans to school where this was justified as the tradition of the Prophet.[191] The Malaysian character of religious freedom would be shaped by the pre-eminent demands of Islam, which would make an anomaly of the case of *Jamaluddin bin Othman*[192] where apparently the supremacy of Islam was ignored by the Supreme Court.[193] This model of religious freedom which prioritises Islam not only against other religions but government policy would be entirely unsuitable in the Singapore secular order. This is an instance where Malaysian jurisprudence, being based on incompatible values, serves as an anti-model. In another case which deals with former Muslims who convert out of Islam, a restrictive decision potentially

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188 Anthony J Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (New York: Cambridge University Press, 2001) at 13-16.

189 This is evident in the non-conflation of "Malay" with Muslim with respect to the criteria for defining minority Malay candidates for purposes of GRC elections: Article 39A, Constitution of the Republic of Singapore. Also, Singapore's religious liberty clause rejected the Malaysian model which protects Islam by restricting propagation of other faiths among Muslims. Paragraph 38 of the 1966 Wee Commission notes: "[W]e are not aware of any law in Singapore which controls or restricts the propagation of any religious doctrine or beliefs among persons professing the Muslim religion and because we think it would be inappropriate and indeed inconsistent that there should be any provision in the Constitution of a democratic secular state such as Singapore expressly singling out a particular religion for special treatment…". Appendix D, Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Butterworths: Asia, 1997) at 1025.

190 Article 3, Constitution of the Federation of Malaysia.

191 See *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi & Ors* [2000] 5 MLJ 375 which has not yet been reported in English, concerning an expulsion of the plaintiffs for wearing turbans to primary school. The Seremban High Court concluded that wearing turban was constitutional: "DAP urges Singapore to rescind school tudung ban" *New Straits Times*, Malaysia, (1 February 2002) (available on Lexis, accessed 24 May 2002).

192 [1989] 1 MLJ 368 (High Court) and 418 (Supreme Court).

193 Abdul Aziz Bari, "Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiqulrahman" [2000] 2 MLJ cxxix at cxl.

oppressive to the freedom of conscience was adopted, where it held that the right to convert out of a religion was not constitutionally protected,[194] contrary to international human rights standards.[195]

(vi) Tudung *Tension: The Aftermath*

The *tudung* controversy has revealed the delicacy of race relations and quelling suspicion and promoting tolerance, which cannot be enforced through legal means, is very much the order of the day. It remains to be seen whether the issue will be litigated.

To placate the concerns of Muslim/Malays, the government felt compelled to hold a dialogue on topical issues with Malay community leaders in late January-early February 2002. It also announced that the People's Association would be studying whether students from Special Assistance Plans (SAP) schools, often criticized as hotbeds of Chinese elitism,[196] mixed with students of other schools, and whether there was racial mixing in other spheres of the common domain like Housing Board estates[197] and national military service. There is also a concern to prevent

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[194] *Daud bin Mamat & Ors v Majlis Agama Islam & Anor* [2001] 2 MLJ 390 (High Court, Kota Bharu). The plaintiffs, who had converted out of Islam had not been considered by the official religious authorities to be apostate and hence were still subject to the religious authorities of a religion they had firmly rejected. The learned judge adopted a very formalistic approach in noting at 402A-F that "[t]he act of exiting from a religion is certainly not a religion or could be equated with the right 'to profess and practise' their religion. To seriously accept that exiting from a religion may be equated with the latter two interpretations would stretch the scope of article 11(1) of the Federal Constitution to ridiculous heights…if article 11(1) of the Federal Constitution were to read, *inter alia*, 'everyone has the right to renounce or profess and practise his religion…my conclusion could certainly be steered towards a different course". Even in the absence of this "additional hypothetical ingredient", it is submitted that the learned judge should have given effect to the spirit, not the letter of the law.

[195] The Human Rights Committee has held that the freedom to "have or adopt" a religion or belief necessarily entails the freedom to choose a faith, including the right to replace one's current religion with another or to adopt atheistic views. Para 5, Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev 1 at 35 (1994).

[196] "So, who's afraid of SAP Schools?" *The Straits Times* (16 February 2002) at H8.

[197] Contemporary housing policy with respect to public accommodation since 1989 operates on an imposed race quota designed to break up ethnic enclaves in HDB neighbourhoods by setting specific limits on the proportion of residents of each race allowed to buy flats in HDB specific neighbourhoods, which house some 80% of Singapore's population, to reflect Singapore's racial balance. See Ooi Giok Ling, Sharon Siddique & Soh Kay Cheng, *The management of ethnic relations in public housing (*Singapore: Times Academic Press for Institute of Policy Studies, 1993). Lily Zubaidah Rahim has argued that integrated government housing has dispersed the Malay minority and diffused is voting power. For views on Malays as a socio-economic underclass, see her book *The Singapore Dilemma: The Political and Educational Marginality of the Malay Community* (Kuala Lumpur: Oxford Univeristy Press, 1999).

the development of racial enclaves in schools[198] as the common perception is that Malays insulated from other races fail to acquire English proficiency and attain lower educational standards. Race quotas were once imposed on schools in the 1980s, placing a cap that only 25% of students in any one primary school should be Malays, but this was discontinued for impracticality.[199]

The prioritisation of the management of race relations is also reflected in the establishment of informal grassroots groups called the Inter-Racial Confidence Circles in schools, workplaces and elsewhere to promote inter-communal dialogue, foster national unity and manage domestic unrest.[200] The upshot is that racial harmony and integration, a recurrent constitutional motif, cannot be taken for granted. It is likely that the government will endeavour, through legal and extra-legal or more informal means to safeguard the values of diversity, pluralism and secularism.

III. A CODA ON CONSTITUTIONAL CULTURE

A constitution is the institutional translation of three primary guarantees:[201] first, it represents a principled guarantee delineating a political community's legitimate objectives, as reflected in its political organisation and protection of rights. Second, as an organisational guarantee, it allocates and regulates political power and lastly, as a representational guarantee in democratic societies, it seeks to ensure that citizens may equally participate in civic and political life. The actualisation of these guarantees will depend to some degree on a country's constitutional culture which ultimately moulds the understanding and reception of the idea of citizenship. The idea of citizenship is receiving increasing prominence as the project of nation-building continues, with increasing appeal to intangibles that transcend materialism and invoke passion, patriotism and loyalty. The political rhetoric centres around the "remaking of Singapore",[202] to take her beyond the narrow pale of "cash, credit card, car, condominium and country club",

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198 "Malay enclaves in schools a concern" *The Straits Times* (23 February 2002) at 4. In February 2002, the formation of an Education Ministry committee to promote mixing among the races at school was announced: "Move to boost racial mixing in schools" *The Straits Times* (20 February 2002) at 4.

199 Sandra Davie, "Should race quota be re-imposed on schools here?" Insight, *The Straits Times* (23 February 2002) at H12-13. See also "Racial quota in schools not helpful" *The Straits Times* (3 March 2002) at 3; "AMP against racial quotas in schools" *The Straits Times* (5 March 2002) at H7.

200 "S'pore at risk if races assert separate identities" *Sunday Times* (3 February 2002) at 33; "New push to strengthen racial ties" *The Straits Times* (30 January 2002) at 1.

201 Dario Castiglione, "The Political Theory of the Constitution" in *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell Publishers, 1996) 6 at 22.

202 "New team to take S'pore beyond 5 Cs: New Remaking Singapore Committee will probe political, social and cultural norms to help prepare nation for the future" *The Straits Times* (15 February 2002) (available on Lexis, accessed 24 May 2002).

to a new set of five Cs: "care, concern, charity, consideration and compassion".[203]

The Constitution seems sadly marginalised in this "remaking" project, which may be characterised at an attempt to elucidate and consolidate national identity. Constitutional principles evoke the intangible ideals which contribute towards rooting a sense of ownership in a polity. A quasi-feudal, paternalistic mode of government immunised from effective challenge is not apt to produce active citizens but detached observers. Constitutional principles like that of popular sovereignty and the supporting rights that sustain a democracy, where actualised, can inspire a stakeholder mentality in the bosom of the *demos* which is crucial to nation-building. Multi-culturalism affirms the value of diversity and hopefully, that of tolerance that helps us navigate our co-existence in pacific fashion. Order for order's sake can be achieved through brutal means whereas a humane order suffused with just values is more meet for a more compassionate, forgiving society that Singapore aspires to be.[204]

Recent constitutional developments have been dominated by concerns for the public order values of security and harmony. These values are however facilitative in nature, instruments to serve greater ends, such as the ability to effectively participate in a democratic polity which treats citizens as respected equals. In terms of holding government accountable, the debate over the juridical status of the vote demonstrates some interest in the ultimate political check the citizenry wields over Parliament and the Government and it is hoped that this fundamental right will be given express affirmation as a constitutional liberty. Aside from amending election regulations to make for a more even playing field, allowing more space for civil and political liberties will be important to the functioning of our Westminster based system of parliamentary government. In allowing for opposition parties and political competition, it remains committed to an adversarial form of democracy. Parliament as an elective institution, through innovations like the NMP scheme and recent suggestions about self-regulating shadow cabinets composed of members of the governing party seems to be trying to stimulate or simulate political debate without the politics. NCMPs and NMPs remain guests of the House and may be evicted by constitutional amendment or parliamentary choice. They are products more of largesse, perceived necessity or utility, rather than legitimacy. NMPs are widely regarded as enhancers of public debate and a possible

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[203] Sumiko Tan, "I dream of winning Toto: The Government has formed a committee to look 'beyond the 5 Cs' to 'remake' Singapore. But why feel so apologetic about material goals when they can be the means to worthy ends?" *The Straits Times* (3 March 2002) (available on Lexis, accessed 24 May 2002).

[204] "S'pore's unforgiving culture not helpful; if the country hopes to breed a successful competitive spirit, society's attitude towards second chances must change" *The Straits Times* (18 May 2002) (available on Lexis, accessed 24 May 2002).

outlet for under-represented voices[205] while NCMPs guarantee a nominal opposition presence in Parliament, but one of many "alternative voices" therein. Hence the apt observation of a civil society group that:

> Intense competition is a hallmark of Singaporean life. Students are streamed, schools are subjected to rankings, local labour to foreign 'talent', and local businesses to the government-linked companies and multinational corporations.
> Yet, the one institution that is not subject to any serious competition in Singapore is the PAP.[206]

It must be remembered that voting, which is a technique of legitimation, requires a genuine choice between competing parties. Effective modes of political accountability and legal control through judicial review are needed to break the stranglehold of a legal culture of control and the ennui it germinates. The development of a rights consciousness, that is, the ability to frame legitimate interests in the language of rights as justiciable entitlements which may be vindicated through legal channels, will empower the citizen. A responsive and accountable government will encourage civic participation. The articulation of a set of constitutional principles and directives in a constitutional preamble, forged through genuine consultation rather than imposed from on high, can crystallise national identity. Many latter-day constitutions commence with a preamble recounting their history, sense of destiny and the values they hold dear.[207] The 1987 Philippines constitution even goes so far as to advocate in its preamble its commitment to a regime of truth, justice, freedom, *love*, equality, and peace. If taken to heart, this would inform a robust notion of citizenship that is worthy of being prized. Idealistic and even naïve as this may seem, it is idealism that fuels passion. Issues of nation-building and citizenship are really about the "soul" of a constitution which in its simplest form constitutes a blueprint for

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[205] PAP MP Irene Ng for example has suggested that the NMP scheme might be a way of increasing the number of women MP who are as yet under-represented in Parliament: *Singapore Parliament Reports*, Volume 74, 5 April 2002 col 62. The CEDAW Committee has also registered its concern about this under-representation, noting in para 88 of its Concluding Observations of 31 July 2001 (A/56/38) that the Singapore government should "enhance its efforts to increase women's representation in politics and decision-making through a gender-sensitive application of the meritocracy principle and by taking measures to guarantee the equal opportunity of women to participate in these areas. Such measures may include the imposition of minimum quotas for women political candidates." The Singapore representative had explained at para 62 that the meritocracy principle was the reason why her government had not introduced a women's representation quota in Parliament, which remained low at 6.5%.

[206] Lam Peng Er, Harish Pillay, Chandra Mohan K Nair, Roundtable Exco Members, "Lack of competition will hurt PAP and nation" Forum, *The Straits Times*, Singapore (10 November 2001) at 26.

[207] See, for example, the post apartheid South African constitution and the post Communist constitutions of the central and east European states.

how we should live our lives as a community and as individuals. Culture, including constitutional culture, must develop from the grassroots. Man does not live by bread alone and although pragmatism is functional and sometimes wise, passion is sublime.[208]

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[208] Sonny Yap, "Must passion come with a bottom line?" Insight, *The Straits Times* (June 17, 2000) at 70.