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THE INDEPENDENCE OF THE CRIMINAL JUSTICE SYSTEM IN SINGAPORE*

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Judicial and legal institutions in Asia, in general, and Singapore, in particular, have come under criticism on the ground that they are not independent from the government of the day. This article explores the problems involved in assessing the value of such a critique: the open-endedness of the idea of independence itself (which in real life is a matter of degree), empirical difficulties in demonstrating that these institutions have indeed succumbed to improper governmental pressure, and the need to distinguish between institutional independence (as determined by constitutional arrangements) and actual independence (as demonstrated by the decisions made in particular cases).

I. THE IDEAL OF INDEPENDENCE

The criminal justice system is a particularly fascinating example of the inter-play between the different branches of government in a governmental endeavour. It is easy enough to describe: the Legislature makes the laws which define what a crime is, and which also prescribes what the process should be;[1] the Executive runs the enforcement machinery from detection and investigation to prosecution;[2] the Judiciary adjudicates guilt or

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1 Art 38, Constitution of the Republic of Singapore, 1999 Rev Ed (http://statutes.agc.gov.sg/) (hereinafter called "the Constitution") vests "legislative power" in the Legislature, a power normally thought to include the creation of substantive crimes and the prescription of criminal procedure, both pre- and post-conviction. The term "Parliament" is popularly used synonymously with "the Legislature", although technically, the Legislature is made up of Parliament and the President, with the President exercising a largely, though not exclusively, ceremonial role.

2 Following the "Westminster model" of the United Kingdom, the executive power of Singapore vests formally with the President (art 23, the Constitution) who must normally act on the advice of the Cabinet which is headed by the Prime Minister (art 21(1), the Constitution). Following constitutional amendments in 1991 (Constitution (Amendment) Act 5 of 1991), the Presidency became an elected office vested with real executive powers, essentially of vetoing certain decisions: arts 21(2), 22, 22A-I. Debate continues to rage over the optimal degree of independence from the Cabinet the President has, or ought to have: see Kevin YL Tan, "The Elected Presidency in Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991" [1991] Sing JLS 179, (Prime Minister)

innocence, and, if necessary, the punishment, on the material presented to it by the prosecution and the defendant;[3] the Executive once again takes over and carries out the sentence of the court. Yet, this neat demarcation of jurisdiction cloaks a voluptuous complexity. Modern, *ie* essentially Western-liberal, conceptions of government extol the virtues of the separation of powers.[4] The theory is that, by dispersing power over several independent institutions, each will provide a check and balance for the others, minimising the abuse of power.[5] Translated into the context of criminal justice, the collective power of the state to punish for crimes ought to be separated and vested in different and independent branches of government. However, in almost the same breath, qualifications and exceptions must follow. These will differ from jurisdiction to jurisdiction. In Singapore, although the Executive is theoretically accountable to the Legislature, the Executive comprises the leaders of the ruling majority in the Legislature. This is true not only of Singapore, but of constitutional systems of the "Westminster model", inherited from the United Kingdom. The result is that the separation of powers between the Legislature and the Executive is not practically significant—the executive "tail" wags the legislative "dog".[6] That leaves the Judiciary as the institution truly separate from the legislative/executive block.[7] The extent to which the judiciary ought to be separate or independent in its functions from the other branches of government is the first major inquiry in this discussion. The second flows from a rather less-noticed feature of the constitutional arrangement in Singapore. From the entirety of executive powers is carved out

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Goh Chok Tong, "The Elected Presidency: an Important Milestone in Singapore's Constitutional Development" 17(5) (1993) Speeches: A Bimonthly Selection of Ministerial Speeches 5. The broad themes of this debate are not dissimilar with those of the present discussion.

3 Art 93 vests "judicial power" in the superior judiciary and in the subordinate judiciary as legislation may provide. Although the language is grammatically capable of being construed so as to subject even the superior judiciary to the dictates of normal legislation, that would reduce art 93 to an exercise in futility.

4 See the historically influential views of Montesquieu, *The Spirit of the Laws* (Nugent, trans, 1949) 51 ("there is no liberty, if the judiciary power be not separated from the legislative and executive") and Madison, The Federalist No 51 (Cooke Ed, 1961) 347 ("The only answer that can be given is … by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.")

5 Montesquieu writes, *ibid*, "were [the judiciary] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control …were it joined to the executive power, the judge might behave with violence and oppression".

6 Conceivably, Parliament can disagree with the Executive and refuse to, say, vote in favour of executive sponsored legislation—but the "whip" system constrains individual members of Parliament from voting against the executive, and they do so at pain of being expelled from the ruling Party, which also unseats them from Parliament: art 46(2)(b).

7 There is potential for the elected President, *supra*, note 2, to play an independent role, but that is another story for another day. Critics point out that the very stringent and apparently establishment-oriented preconditions for anyone who wishes to run for the Presidency: art 19(2)(g).

prosecutorial power which vests in the Public Prosecutor, who enjoys a security of tenure, and thus an independence, only a little less than that which pertains to the Judiciary.[8] This "separation" from the rest of the Executive presupposes that there are influences emanating from that branch of government which the Public Prosecutor ought to be protected from. A similar question arises—to what extent should the Public Prosecutor be separate from or independent of the Executive?

There is a fundamental tension which bedevils any debate on the independence of governmental institutions. The ideal of separation and independence has at its focal point the prevention of an abuse, or misuse, of powers.[9] Unfortunately, it comes at a cost—the separation of powers amongst different independent institutions normally means a weakening of the collective power of the state to formulate and carry out its policies. The speed and efficiency with which governmental tasks can be done is, to a degree, compromised: more than one institution has to be persuaded to permit the venture. The formal constitutional arrangements (at least in Singapore) seem to proceed from a Western-liberal premise of minimal government—the state as an umpire for private enterprise.[10] An essentially passive government has little to fear from the inefficiencies of separation of powers amongst independent institutions. The Asian reality has been very different. For various reasons, Asian governments have seen the need to do a lot of things, and in a great hurry—to play as well as umpire.[11] The fear is not so much that too much power will be abused, but that there might not be enough power to do what it wants. Compound this with the actual or perceived (relative) instability and fragility of organised government itself,[12] and it will not be difficult to see why the ideal of separation of powers is not often held very dearly in the hearts of Asian governments. One does not readily give away what one possesses (or what one thinks one possesses) little of. The very illiberal reaction of many Western liberal governments to the terrorist strike on New York's twin towers on Sept 11th seem to confirm what Asian leaders knew all the time—when a government

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8 Art 35, discussed *infra*.

9 By "abuse", I mean an intentional "misuse".

10 See Kanishka Jayasuriya, "Corporatism and Judicial Independence Within Statist Legal Institutions in East Asia", *Law, Capitalism and Power in Asia* (Kanishka Jayasuriya ed, 1999) 173, who distinguishes between a "liberal" (prevalent in the liberal West) and a "statist" (favoured by East Asian regimes) conception of "legalism".

11 I do not enter into the question of whether or not these governments are correct in having such perceptions and priorities.

12 Often, much more is at stake in political struggles in Asia—compare the relatively incremental changes in policy occasioned by the outcome of a contest between the Republicans and the Democrats in the United States, or between Labour and the Conservatives in the United Kingdom, and, say, the radical consequences which followed the result of the contention between the communist and the capitalist factions in the early history of independent Singapore: see Lee Kuan Yew, *The Singapore Story: Memoirs of Lee Kuan Yew*, 1998.

is facing a crisis in which it has to do a lot and very quickly, Western liberal practices (together with the separation of powers) are readily dispensed with, even by Western liberals.[13] Many Asian governments have, for many years, faced far graver crises and threats than does the United States, even in the aftermath of September 11.[14] Yet, this is not to say that the potential for abuse or misuse of powers can be completely ignored, even in times of crisis. Indeed, the probability and consequences of a wrongful use of power increase with the centralisation of power.[15] Few governments, in Asia or elsewhere, do not ascribe to the general principle of a separation of powers, and especially, the independence of the judiciary.[16] It comes to this: the question is not so much whether or not the judiciary should be independent, but the *extent* or *degree* to which a particular judiciary ought to be independent, in the context of the its government's legitimate needs.[17] Where opinions about the legitimate needs of government differ, there will naturally be disagreements about how independent the judiciary ought to be.

The most that lawyers can do is to assist in the process of setting up a structure which best mediates between the need to centralise power (in order to achieve legitimate governmental objectives) and the need to separate power to prevent abuse or misuse of power. Definitive answers will be rare, if any. Where the balance is to be struck depends on highly subjective factors: the weighing of what are essentially incommensurables, and speculative predictions of individual and governmental behaviour. What follows is a sketch of the some of the difficulties involved in mediating between the contending pulls of separation and centralisation of

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[13] See the collection of articles on the reaction of countries such as the United Kingdom, Canada, Australia and the United States: Special Feature on Terrorism, Security and Rights [2002] Sing JLS 1-270. Just one example will suffice: it is all very well that the United States Judiciary enjoys and exercises a great degree of independence, but when the need arose to try the suspected terrorists, the plan was to try them, not in the ordinary courts, but in courts martial, military courts which do not enjoy anywhere near the independence of the ordinary judiciary.

[14] One readily thinks of Cambodia in the Pol Pot years, or Vietnam at the time when it was at war with the United States, or Indonesia in the period of uncertainty following the downfall of Suharto.

[15] For example, the Indonesian polity has been keenly aware of the dangers of an over-centralisation of powers in the time when President Suharto was in charge. Thus the power of the Legislature in Indonesia to remove the President, which was exercised to unseat President Abdurrahman Wahid. But that brings along with it the cost of an ineffective President having to look to the Legislature for approval at every turn.

[16] See the statement on the Principles of the Independence of the Judiciary issued after the 6th Conference of Chief Justices of Asia and the Pacific, Beijing 19 August 1995 (http://www.lawasia.asn.au/beijing_statement.htm), describing the independence of the judiciary as "indispensable". This document was signed by not less than 20 Chief Justices from jurisdictions ranging from liberal Australia to socialist China. The devil is, of course, in the detail.

[17] David P Curie, " Separating Judicial Power" (1998) 61 Law and Contemporary Problems 7, speaking of the United States says, "[o]ur constitutional scheme for judicial independence and accountability is imprecise and untidy".

power. Singapore shall be the focus of the discussion, but comparative material from other jurisdictions will be employed, where appropriate.

The separation-centralisation debate is an old and difficult one, and it perhaps deserves a much more detailed treatment than can be done in an article such as this. A sketch does risk becoming too sketchy, and very few clear conclusions are reached here. This discussion takes that risk. It has the very modest aim of locating a politically-charged discourse in a less partisan academic context by "staking out the terrain", leaving much of the spade-work for subsequent scholarship.

II. JUDICIAL INDEPENDENCE

The constitutional arrangements for the appointment and removal of superior Judges exhibit an intriguing blend of independence and dependence. The Prime Minister, who is the *de facto* head of the Executive government,[18] possesses the primary power of appointment.[19] However, the Prime Minister must "consult" the Chief Justice,[20] and more importantly, the President, who is popularly elected, has the power to veto an appointment.[21] There is no doubt, however, that these other participants in the appointment process have a potentially small part in the *final* say as to who should be appointed to the Judiciary.[22] This does not make much sense from the point of view of the Judiciary being a check against the abuse or misuse of executive power—can we really expect the head of the Executive to appoint an independent-minded judge who might significantly impede executive power? A well-meaning Executive, sincerely believing in the justness and legitimacy of its governmental programme, will naturally seek to appoint Judges who, in essence, believe in the same fundamental policies. The problem is that this is anathema to the logic of the separation of powers, directed as it is on the potential for the abuse or misuse of power. The same constitutional arrangement, so helpful to the *bona fide* Executive, can be equally convenient to a *mala fide* Executive bent on preserving its power at any cost. A higher degree of separation or independence for the Judiciary can, of course, be achieved by a variety of other means; *eg*, direct election of Judges, or confirmation by the Legislature, or by a sort of Judicial Appointments Commission with more or less politically neutral representatives. These alternative processes carry with them a host of other

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[18] The President is, of course, the *de jure* head, but he must in most situations act according to the "advice" of the Prime Minister: *supra*, note 2.

[19] Art 95.

[20] Art 95(2).

[21] Art 22(1)(a).

[22] This is not to say that, in practice, the Chief Justice will not have considerable influence on who is to be appointed to the Judiciary. The elected Presidency is still too young in institution for any reliable assessment to be made about its capacity to act independently of the executive.

questions of detail and problems of their own.[23] Perhaps more importantly, they carry with them the increased possibility of an *impasse*[24]—judges cannot be appointed because the decision makers cannot agree. Nor is it the case that appointments under these more elaborate schemes will *necessarily* be better than the existing system. The more players there are, the greater is the likelihood that there will be bargaining and tradeoffs—simply, it cannot be said with any certainty that the likelihood is that the most competent and fair minded person will be appointed. Yet it is probably the case that a more diffuse power of appointment is more likely to produce a Judiciary which is more sensitive to the abuse or misuse of executive power. The choice made under the existing system is clear—the decision to tie judicial appointments so closely to the Executive is a decision that the national interest is better served by empowering the Executive more fully so that it can pursue its programmes, and not so much by instituting administrative refinements to protect against possible abuse or misuse of executive power. This decision may or may not be right and much depends on speculative factors: *eg*, is the Prime Minister likely to appoint Judges who are so closely allied to the Executive that they will inevitably fail to detect abuse or misuse of power? Is the potential for abuse or misuse of power significant enough to justify the cost of putting a checking mechanism into place?[25] Each jurisdiction will have to decide for itself how the balance is to be struck. Judicial independence in the real world is a matter of degree, not of kind. What is clear is that simplistic studies of apparent personal and professional connections[26] between the Executive and the Judiciary will not do—in a small jurisdiction like Singapore's, there will be very few potential appointees who have never had anything to do with the executive government.[27] The Judiciary must be judged on its performance in the context of actual litigation.

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[23] Direct election of judges may free them from executive influence only to tie them down to the need to play to the gallery in order to win the next judicial election. A Judicial Appointments Commission will shift the politics to the question of who should be appointed to that Commission, and may do no more than add another layer of bureaucracy without necessary gains in independence. Legislative confirmation has little significance in Singapore, given the close identity between the executive and the legislature.

[24] Ackerman, "The New Separation of Powers" (2000) 113 Harvard LR 633 calls this phenomenon a "crisis of governability".

[25] The Singapore government has often professed to rely more on "honourable men" (*jun zi*, in Confucian terminology), rather than on constitutional constraints.

[26] See, *eg*, Worthington, "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28 Journal of Law and Society 490, for an account with tabloid raciness.

[27] The author can only surmise that in the unlikely event of his elevation as a Judge, such critics would undoubtedly point to his first job in the government legal service, and to his many subsequent years in the National University of Singapore, a government university, of which the Law Faculty is, Worthington tells us, *ibid*, is headed by a "cadre" or "proto-cadre" of the People's Action Party, the party in power.

A related issue is the removal of Judges. The logic of independence and separation demand that the Judiciary be protected from Executive dismissal—a Judiciary living in fear of being sacked is not likely to be very effective in checking the abuse or misuse of executive power. On the other hand, insulating the Judiciary too much will not be conducive to judicial responsibility or accountability—the same shield of immunity protects the good as well as the bad. Again, the constitutional regime presents an interesting amalgam of dependence and independence. Three decision-makers must agree: first, either the Prime Minister or the Chief Justice;[28] second, the President; and third, a Tribunal of five serving or retired superior Judges from Singapore or from any part of the Commonwealth.[29] The balance appears to have been struck firmly away from Executive dominance—the Prime Minister cannot unilaterally remove a Judge. Yet in neighbouring Malaysia, where there is a similar system (with some minor differences), there was a general perception that it was completely inadequate in dealing with a particularly gross Executive incursion into the judicial realm, culminating in the removal of the head of the Judiciary and two other superior court judges.[30] The weak link was probably the power of the Prime Minister over the composition of the 5-Judge Tribunal, giving rise to the possibility (and, some say, actuality) that the Prime Minister can "pack" the Tribunal with people who can be expected to make a decision pleasing to the Executive. If that indeed was the case, can anything be done institutionally to prevent this from happening (or from happening again)? Of course, the removal process can be tightened further—*eg*, by taking away the power of the Prime Minister to appoint the 5-Judge Tribunal. But who then is to have that power? The Chief Justice, where the judge sought to be removed is not the Chief Justice, can be given that power, but that is cold comfort if the Chief Justice is allied with the Prime Minister. Where the Chief Justice is the Judge in question, the alternatives are not at all clear. Perhaps the answer is to put in place another layer. Some alternatives come to mind—confirmation by a certain majority of the Legislative body, or even a popular referendum. Both these alternatives require us to fix a requisite majority.[31] We can go on making the removal more and more difficult—but it has to be borne in mind that the

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[28] The provisions are not entirely clear as to whether a Judge can be removed against the wishes of the Prime Minister.

[29] Art 98.

[30] The literature is legion, reflecting the significance of this traumatic event: for a recent analysis, see Khoo Boo Teik, "Between Law and Politics: The Malaysian Judiciary Since Independence", *Law, Capitalism and Power in Asia* (Kanishka Jayasuriya ed, 1999) 205.

[31] There are other problems. In Singapore, as in Malaysia, the Executive controls the Legislature, so legislative confirmation would add little in terms of independence. A popular referendum comes with problems of its own—the case must be presented fairly to the public—no such mechanism exists, and where government dominance in the mass media is a fact of life, it is difficult to see how a referendum can save a good judge from an executive bent on removing him or her.

obstacle we want to put in between a good judge and an evil executive is also the same obstacle that will stand between a good executive and an evil judge. Perhaps there is a limit to beyond which mere institutional safeguards cannot go—in the face of a determined executive, maybe nothing by way of institutional design will suffice to thwart its intentions.

In Singapore, it is not so much the superior but the subordinate judiciary which has come under scrutiny. The issue of the independence of the subordinate judiciary has become more and more important in recent years with the significant increases in its jurisdiction, both civil and criminal.[32] Things came to a head when the Senior District Judge (the most senior member of the subordinate judiciary) was transferred from that august position to an "ordinary" posting as a deputy public prosecutor.[33] This occurred soon after the judge acquitted a prominent opposition member of Parliament of two charges of lying in a statutory declaration. The fear was that the transfer was motivated by executive disapproval of the acquittals.[34] It was never established with any finality exactly why the transfer was effected. One possibility is that the transfer was routine and had nothing whatever to do with the acquittals[35]—if so, the independence of the subordinate judiciary is not in question. The other possibility is that the judge was transferred because of his performance at the trial.[36] If the transfer was because of his general competence (or incompetence), the identity of the accused being incidental, then again few will argue that the transfer was improper in any way. If, however, the purpose was to placate an incensed executive (regardless of the merits of the case), then something is wrong—the inevitable message is that any decision against the government (whether justified or not) will be taken against the judge concerned, and may result in a transfer or other forms of censure. This does indeed run against the independence of the subordinate judiciary. A look at

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[32] In civil cases, the District Court limit is normally S$250 000, and exceptionally S$3 million, and the Magistrate Court limit is generally S$60 000: s 2, Subordinate Courts Act, Cap 321, 1999 Rev Ed. In criminal cases, the District Court may sentence up to seven years' imprisonment, and Magistrate's Courts two years' imprisonment, but the power of the District Court goes up to 14, or even 20 years imprisonment for repeat offenders: ss 11-12, Criminal Procedure Code, Cap 68, 1985 Rev Ed.

[33] Academic study of this incident is rare: see *Report of the Commission of Inquiry into Allegations of Executive Interference in the Subordinate* Courts—1986, Cmnd 12 of 1986, and the Parliamentary Debates leading up to and following the report: especially, vol 47 *Parliamentary Debates*, 21 March 1986 col 891-2, vol 48 *Parliamentary Debates*, 29 July 1986, cols 167-177.

[34] The Commission of Inquiry, *ibid*, did find that there was no executive interference, but essentially on the ground that there was no evidence of it presented to the Commission—there was no attempt to investigate exactly why the transfer was effected. What it did find was that the transfer was decided upon by the Chief Justice in consultation with the Attorney-General.

[35] This seemed to be the thrust of the earlier Parliamentary debate, *supra*, note 33.

[36] This appeared to be the drift of the later Parliamentary debate, *supra*, note 33, although it may have been based entirely on what the Prime Minister surmised the motivation of the Chief Justice (who made the primary decision) to be.

the constitutional arrangements for the subordinate judiciary is necessary. The subordinate judiciary are members of the Legal Service which is constitutionally governed by the Legal Service Commission.[37] Its composition is again an interesting combination of independent and dependent elements. Three of its members enjoy a high degree of (at least) formal independence from the executive: the Chief Justice, the Attorney-General and a superior judge appointed by the Chief Justice. Three others, the Chairman and two other members of the Public Service Commission, also enjoy a degree of independence, but nowhere approaching the security of the first group of three.[38] Members of the Public Service Commission are appointed by the joint decision of the Prime Minister and the President, but may only be removed by a process similar to the removal of judges.[39] However, they only enjoy a (renewable) tenure of five years.[40] It is not at all clear how much further institutional protection of independence can go. If indeed the Commission transferred the judge out of the improper motive of appeasing the executive, what was problematic was not so much independence of the subordinate judiciary from the executive, but independence from the superior judiciary and the Attorney-General.[41] Even if the Executive had explicitly instructed the Commission to remove the judge, that instruction could, constitutionally, have been ignored. If the subordinate judiciary is not to be subject to the superior judiciary, then it is not obvious to whom it should be subject to. We could, of course, proceed to entrench the subordinate judiciary in the same way as superior court judges are, but again it must be remembered that there are a great many more subordinate court judges of varying seniorities (than there are superior court judges).[42] The obstacles put in the way of transfer or removal of subordinate court judges apply equally for legitimate as well as illegitimate purposes.

The Singapore judiciary has come under fire on a number of other counts.[43] It is not my purpose to review them in any detail. The point is that

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37 Art 111.

38 Art 107. How independent the career public service ought to be from the political executive is an unexplored area in Singapore. The constitutional insulation of the Public Service Commission from the executive must imply that there are executive influences which are not to be heeded. On the other hand, it is difficult to imagine a workable government where there is not an extremely high degree of public service compliance with executive dictates. Exactly where the line is to be drawn is the problem.

39 Dismissal must be for cause, upon the requisite finding by a tribunal of 3 superior court judges. Art 108 also protect against disadvantageous alteration of terms of service.

40 Art 107.

41 It emerged at the proceedings of the Commission of Inquiry, *supra*, note 33, that "lateral transfers" of this kind are, by convention, decided upon almost entirely by the Chief Justice and the Attorney-General, without substantial input from the other members of the Legal Service Commission.

42 There are, at the time of writing, 13 superior court judges, and 73 subordinate court judges.

43 In addition to the piece by Worthington, *supra*, note 26, see also the view of former Solicitor-General, now turned political opposition, Francis Seow, "The Politics of Judicial

any institutional measure taken to enhance any further the independence of the judiciary will normally come with costs and drawbacks of some kind. The difficult task is to weigh the benefits and the burdens. The power of the executive to extend the tenure of a superior judge beyond the retirement age has been said to present judges with an incentive to be in the good books of the executive.[44] Yet a decision to prohibit extensions of any kind for whatever reason need not produce a better result—one can imagine a sterling judge, well able to function beyond the retirement age of 65, being forced to retire compulsorily, only to be replaced by a less capable one.[45] Similarly, it is said that Judicial Commissioners, who have the power and privileges of a superior judge, except that their tenure is only for such periods as the executive deems fit, have a similar incentive to be on the right side of the executive in expectation of either an extension or an appointment as a regular superior judge.[46] Even if, as has been alleged, appointments as Judicial Commissioners are a probationary period in which judges are assessed for suitability to be appointed as regular superior judges, it all depends on what they are being assessed for. Just as, contrary to the ideal of independence, a judicial commissioner is being assessed for political compliance, he or she may also be assessed for general competence and temperament (regardless of political leanings).

I have so far spoken only of formal institutional arrangements which are thought to impact on judicial independence. Even in constitutional structures most conducive to judicial independence, judges will still have a choice whether or not to toe the executive line out of either sincere belief its correctness or out of a fear of stepping out of line. I pass no judgement on the extent to which the Singapore judiciary actually takes the cue from the executive—indeed I am forbidden by Singapore law even to discuss the matter with any degree of rigour. It is a law which I cannot disagree more with, but that is another story for another day.[47] What must be explored,

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Institutions in Singapore", http://www.sfdonline.org/Link%20Pages/Link%20Folders/The%20Law/judicialinstitns.html.

44 Art 94(3). The word, used by a prominent opposition figure, was "beholden". The danger is that the Judge will dance to the executive tune in order to secure further extensions.

45 It has been observed that strict retirement ages can be exploited by the executive who might then appoint only judges close to the retirement age so that they have to step down before they can gain any confidence as judges.

46 Art 94(4).

47 Regrettably, prosecutions for the archaic offence of contempt of court by "scandalizing the judiciary" is alive and well in Singapore: see, *eg*, *AG* v *Lingle* [1995] 1 SLR 696, where the accused observed, so the court held, that Singapore's judiciary was "compliant" and was fined S$10 000 for it. The rather dubious modern rationale is that failure to punish people who say bad things about the judiciary will undermine public confidence in the judiciary—suffice it to say that where public confidence is not deserved, there is no harm in undermining it; and where it is deserved, what reason do we have that the public will mindlessly accept the criticism, especially in view of the government's ready access to the mass media to counter the adverse publicity? In any event, in view of the revolution in information technology, the effort will probably be futile: most of the works critical of the

albeit briefly, is the crucial question of the extent to which a judge *ought* to follow or support executive policy. Judicial support of the executive is not necessarily a bad thing—it is the branch of government with the greatest claim to democratic legitimacy. Practically, no government can function very well if its executive and judicial branches are continually feuding. Yet the very existence of the judiciary, and the institutional mechanisms to preserve independence necessarily imply that there will be situations in which the judiciary will need to override the wishes of the executive—otherwise, there is no rational explanation for the existence of the institution of the judiciary itself. While it is true that in Singapore, a judicial finding that the executive has been wrong is rare,[48] that does not of itself mean that the judiciary is enslaved to the executive. What remains to be done is a careful and dispassionate analysis of the actual decisions of the judiciary to see why judicial disagreement with the executive is rare. Is it because the judiciary has been unduly deferential, and if so, why? Or is it because the executive has attained a high degree of fairness in its own decision making, and has simply given the judiciary no reason to question it?

The criminal justice system will serve as an illustration of this. It is no secret that conviction rates in Singapore are extremely high.[49] In the context of criminal law, an acquittal is analogous to judicial disagreement with an executive decision as to guilt. Thus, judicial disagreement with the executive is rare. What is to be inferred from this is not clear-cut. It could be, as some critics would have it, that this is an example of the absence of judicial independence—the judiciary, it is said, is simply too afraid to rule against the executive and acquit someone charged by the executive, or at least too intimidated to do it very often. Yet the low acquittal rate is also consistent with a prosecutorial job so well done that only the obviously guilty are brought to court—even the most fair and independent minded judge would have little choice but to convict.[50] To proceed any further, much more study will have to be made into the criminal justice process and the judicial decisions thereon to test which of these two hypotheses are correct.

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judiciary cited in this article is probably contempt in Singapore, but access to them through the Internet is available to any Singaporean capable of using a computer.

[48] Though not unknown—plaintiffs in administrative actions against the government have succeeded in the past: see, *eg*, *Re Fong Tin Choo* [1992] 1 SLR 120. It is perhaps noteworthy that this did not prevent the judge who ruled against the government in this case, Justice Chan Sek Keong, from being subsequently chosen by the executive to be promoted to the post of Attorney-General, an office he still holds, at the time of writing.

[49] It is surprisingly difficult to get hold of acquittal rates for defendants who claim trial, but it appears to be common knowledge that, though certainly not unknown, acquittals following fully contested trials are rare.

[50] *Eg*, investigators into the very high conviction rates in Japan have concluded that because of a scarcity of resources Japanese prosecutors choose only the most promising cases to pursue: Ramseyer and Rasmusen, "Why is the Japanese Conviction Rate So High?" (2001) 30 J Legal Studies 53.

Undoubtedly, the criminal justice system comes under the most intense scrutiny when it is a political opponent of the executive government of the day who is being charged and tried. Yet it cannot be denied that political opponents of the executive can, possibly, commit crimes, and when they are charged, they are liable to be convicted. What we can reasonably infer about the independence or compliance of the judiciary from the conviction and punishment of political opponents of the executive government is not an easy exercise. Anyone with even a cursory understanding of the criminal justice process will realise that the decision to convict or acquit and, if necessary, to punish is potentially fraught with the vagaries of numerous subjective exercises of discretion along the path to conviction or acquittal. Criminal offences cannot always be formulated in a manner which is proof against problems of interpretation.[51] Decisions concerning the admissibility of certain kinds of evidence can be a highly subjective affair.[52] Assessing the weight of evidence, which quite often rests on an estimation of witness credibility, is not any more objective a process.[53] As if all this were not enough, the sentencing process is even more uncertain.[54] What we need to know is whether the judge would have decided any differently if the accused were not a political opponent, but it is this that is a remarkably difficult conclusion to arrive at with any degree of conviction. One might be unhappy with the form, or even the existence, of particular offences. One might complain about particular rules of evidence and procedure, or about how certain legislation restrict the sentencing discretion of the courts.[55] But the fact that Judges have to play by rules which are perceived to be wrong or less than satisfactory does not *necessarily* reflect on their independence from the executive. Short of striking down legislation on grounds of unconstitutionality, which in itself raises a host of other problems,[56] even

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[51] A recurring example is found in the area of "strict liability" which present judges with a choice when faced with legislation prescribing an offence which does not spell out explicitly what the mental element or *mens rea* is—the court has to decide whether to read in a particular mental element or to rule that the offence is committed irrespective of any mental element.

[52] A prime example is the decision whether or not to admit a defendant's confession in the course of police interrogation. The law is that the confession must be "voluntary" but the law if far from clear as to what this means exactly. If the sheer fact of compulsory and indefinite interrogation does not render the confession involuntary (and the law assumes this to be so), it is not clear what else is needed to make it so. One may quarrel with the law as it stands, but that is another story.

[53] Again in the context of confessions, admissibility often turns on whether the judge believes the defendant (in that there was undue pressure), or the police (who will deny it).

[54] Traditionally, legislation prescribes a sentencing maximum, leaving the judge the freedom to punish the convicted defendant with anything up to that maximum.

[55] It is an increasing practice for legislation to prescribe a mandatory minimum for certain offences which the legislature deems to need special attention.

[56] The power to strike down legislation on constitutional grounds exists in theory under art 4 (though it has as yet not been exercised in Singapore), but the judiciary has to weigh the implications of countermanding the will of popularly elected officials, and the possibility

the most independent judiciary has to obey the rules set for them by the Legislature. Again, I cast no judgement as to whether the judiciary in Singapore has or has not (improperly) taken into account the identity of accused persons as political opponents of the executive. My burden has been to impress on anyone wishing to make that judgement to be slow in doing so. The other observation I wish to make is that it is not immediately obvious how such eventualities can be prevented on an institutional basis—how can we constitutionally re-arrange it such that the chances of Judges taking covert account of such improper factors are minimised? We come full circle to the earlier discussion on judicial appointments, tenure and removal, and the tension between the conflicting need for separation and integration of governmental powers.

III. PROSECUTORIAL INDEPENDENCE

More astute observers of criminal justice in Singapore point the finger, not at the Judiciary who must judge the case as it comes before it, or at the law that has been given to it, but at the prosecutorial decision to charge political opponents of the executive government. At first sight, whether or not a person is charged depends on whether there is sufficient evidence of a crime.[57] That is true, but it is also the case that no jurisdiction charges and tries everyone for whom there is evidential sufficiency, without exception. Certainly the most serious of offences are seldom not prosecuted, but along the continuum of moderate to low gravity offences, a large measure of prosecutorial discretion is necessary for a number of reasons—*eg*, to allocate prosecutorial resources in the best way possible, or to take into account mitigating factors not adequately represented in the substantive law. Scholars compendiously call these extra-evidential factors "the public interest".[58] In practice, prosecutions are pursued only if there is both evidential and public interest sufficiency.

In Singapore, prosecutorial power and discretion vests, and vests exclusively, with the Public Prosecutor.[59] Although technically part of the Executive, the Constitution confers a fairly high degree of formal institutional independence on the Public Prosecutor,[60] who enjoys protections similar to, though not quite as extensive as, the Judiciary. Appointments are by a process almost identical with judicial appointments.

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that its effort will be rendered futile by a constitutional amendment, which in Singapore can be achieved by a two-thirds majority (art 5).

57 A set of issues surround the question of precisely how much evidence there ought to be before it is said to be sufficient: see Edwards, *The Attorney-General, Politics and the Public Interest* (1984), at 120-9, 413-34; Ashworth, *The Criminal Process* (1994), at 159-94.

58 See Edwards and Ashworth, *ibid*.

59 Art 35(8).

60 Art 35.

Qualifications for the office are the same. The Public Prosecutor can only be removed for cause by a process very similar to the removal of a Judge. The terms of appointment cannot be altered disadvantageously. The Public Prosecutor may be appointed for a fixed term (like Judicial Commissioners) or until the retirement age (like Judges), but that age is rather lower for the Public Prosecutor (60) than it is for a Judge (65).[61] A tribunal to remove the Public Prosecutor consists of three superior court judges (compared to five for a Judge), and there is no provision for foreign participation.[62] These differences, although not completely insignificant, do not affect the essence of formal constitutional independence of the Public Prosecutor.

If prescribing the appropriate degree of separation between the Executive and the judiciary is at certain points difficult, the task of dividing the powers of the Public Prosecutor and the Executive is even more tricky.[63] Again, a balance has to be struck between giving the Public Prosecutor sufficient independence to insulate the prosecutorial decision from improper executive influences, and requiring the Public Prosecutor to work together with the Executive in the pursuit of legitimate governmental aims. An overly independent Public Prosecutor who refuses to prosecute for certain offences because of a disagreement with the executive over the gravity of the infractions can be quite as disastrous as a completely dependent Public Prosecutor who obeys every whim and fancy of the executive.[64] Here is where the problems start for we need to discern the difference between proper or legitimate executive influence which the Public Prosecutor ought to heed, and improper or illegitimate influence which the Public Prosecutor must shut out.

Potentially improper executive interference can arise in two contexts.[65] First, where there is sufficient evidence that a member of the ruling

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61 Art 35(4).

62 Art 35(6).

63 The Public Prosecutor has no investigatory resources of his own and has to rely on the police in that respect: see the problems identified in Sanders, "Constructing the Case for the Prosecution" (1987) 14 Journal of Law and Society 299. In addition, the Public Prosecutor in Singapore is also the Attorney-General, who in his civil functions operates as the primary legal advisor to the executive government: art 35(7)—quite naturally, this is likely to incline the Attorney-General towards identification with (and not separation from) the executive government. It may well be that greater independence can be achieved if the Public Prosecutor were given investigatory resources of his own, and if he does not have to perform the functions of the Attorney-General—the implications of such radical reform cannot be fully discussed here.

64 For example, the executive may perceive illegal immigration to be a particularly serious problem in Singapore, and accordingly instructs the police to crack down on potential offenders—if the Public Prosecutor happens to disagree with the executive and thinks that prosecutorial resources are better spent pursuing other offenders, the apparently legitimate governmental priorities of the executive will be destroyed.

65 There are conceivably other forms of influence—*eg*, where there it is the Public Prosecutor's view that, although there is some evidence, it is insufficient in the normal course for a prosecution, but the executive urges prosecution because the potential defendant is a political opponent. Again, it is not entirely clear whether giving the defendant who is a political opponent special treatment is or is not an abuse of prosecutorial discretion.

executive, or someone associated with it, has committed an offence, the executive may try to influence the Public Prosecutor not to pursue the matter.[66] Secondly, where there is sufficient evidence that a political opponent of the executive has committed an offence, the executive may try to push for a prosecution although it would not have otherwise been in the public interests to do so, *eg*, because of the relative insignificance of the infraction.[67] Even in these apparently obvious scenarios, the line between the proper and the improper is not as clear as we would like it to be. What if the executive advises the Public Prosecutor that criminal proceedings against a particularly popular Minister is likely to result in widespread unrest and violence, and that the prudent course would be to retire the Minister quietly? Of if the executive makes its wishes known to the Public Prosecutor that a particular political opponent who has held himself out to be a politician of high credibility and integrity ought to be prosecuted because the public has the right to know the truth about him? It is no longer obvious that executive influence under these circumstances is either improper or legitimate. The Prosecutor has to make very difficult judgement calls, but the input of the executive is certainly a significant consideration. The crux of the problem is the ambiguity which attends the critical criterion of "public interest". Whenever conflicting and incommensurable public interests have to be weighed, the outcome is seldom clear. Perhaps this is the reason why judiciaries around the world, of both liberal and illiberal reputations, have essentially refused to enter into the realm of prosecutorial discretion or to review its exercise with much conviction.[68] Simply, judicial

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[66] Allegations concerning a closely related kind of executive interference surfaced in the domestically celebrated case of Phey Yew Kok (once trade union leader and government member of Parliament, but fell out of favour on suspicion of corruption), who was "allowed" to flee the jurisdiction: see the defamation suit following such an allegation: *Lee Kuan Yew* v *Seow Khee Leng* [1988] SLR 832. Phey was however charged in court, though he absconded before he could be tried. Opposition politicians have continued to question the resolve of the executive government in locating him: *eg*, vol 69 Parliamentary Debates, 3 Aug 1998, col 756.

[67] Allegations of selective prosecution have been made concerning various opposition figures: J B Jeyaratnam (see an account of the prosecution in *Jeyaretnam JB* v *Law Society of Singapore* [1988] SLR 1, charges of false declaration regarding relatively small sums of money—S$2000, S$200, and S$400); Francis Seow (see a description of the prosecution in *Seow Francis* v *Comptroller of Income Tax* [1990] SLR 601 on charges of evasion of income tax). Across the border in Malaysia, cries of selective prosecution continue to reverberate over the prosecution of former Deputy Prime Minister Anwar Ibrahim, which followed hot on the heels of a falling out between him and the Prime Minister: see an account of the prosecution in *Dato' Seri Anwar bin Ibrahim* v *PP* [2002] 3 MLJ 193 on charges of "corruption", and *PP* v *Dato' Seri Anwar bin Ibrahim* [2001] 3 MLJ 193 on charges of sodomy.

[68] See, *eg*, Kent Roach, "The Attorney-General and the Charter Revisited" (2000) 50 U of Toronto LJ 1, who concludes that the potential for judicial review of prosecutorial discretion has "not been realized".

review requires criteria which are much more manageable than those which now govern the exercise of prosecutorial discretion.

Yet there are instances of clearly improper executive influences. The prosecution of our hypothetical Minister could by no stretch of imagination result in anything like rioting on the streets, or there may simply be insufficient evidence that our hypothetical opposition politician is guilty of any offence. For the executive to counsel against prosecution, say, out of gratitude to the Minister for past contributions to the government, or to press for the prosecution of the opposition politician in the face of evidential insufficiency, simply for harassment value would be undoubtedly improper. But if the Public Prosecutor chooses to buckle under improper executive pressure, it is not clear what alternative constitutional arrangements can prevent that from happening. As it is, a fair degree of independence is already provided for and, of course, any attempt to increase the independence of the Public Prosecutor must also carry along with it the increased danger of governmental paralysis without any obvious constitutional way to resolve the impasse. A system which protects the good Public Prosecutor will also protect the unreasonably obstructionist or incompetent one.

IV. Independence and Pragmatism

Singapore is blessed, or some might say cursed, with an overwhelming commitment to pragmatism. Nothing has value in itself; everything is valued in terms of functionality. It is perhaps as pure a utilitarianism as is humanly possible. There is no magic and nothing sacrosanct, in Singapore, in ideas like "separation of powers", "independence of the judiciary" or even the "rule of law"—things which in some other cultures evoke a fair degree of passion or emotion. The only question is what constitutional system will work better. There is, in its Constitution, an institutional balance of independent and dependent elements, perhaps reflecting the underlying pragmatic philosophy. It does contain a fair degree of formal independence for both the Judiciary and the Public Prosecutor. Perhaps formal independence is all that constitutions can give. What the Judges or Public Prosecutors do with that formal independence is another matter—the most perfectly constructed institutions will still allow the Judge or Public Prosecutor of the day to give in to improper executive pressure, direct and indirect. To expect the constitution to do more is risky—formally entrenching a greater degree of independence for the Judiciary or the Public Prosecutor might backfire when the moral roles are reversed (*ie* when it is a *bona fide* executive pitted against a retrograde Judiciary or Public Prosecutor). Worse, it might provoke the Executive to move in a manner

which is even more destructive to the constitutional order.[69] One can imagine the Executive declaring a state of emergency[70] or, with the requisite majority in the Legislature, enacting constitutional amendments reducing the independence of these institutions.[71] Singapore has often been criticised for having a formal veneer of constitutionalism which masks what is essentially an autocracy. I offer no views on this, but only to say that perhaps a veneer is better than none, for there is the hope that the values inherent in its constitution will seep deeper into the national consciousness, and together with a populace which is fast achieving political maturity, the constitution may eventually come into its own.

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[69] In Malaysia, the removal of the three superior court judges was perhaps one such example: *supra*, note 30.

[70] Art 150.

[71] Art 5. For an example of one such occurrence in Malaysia, see *Khoo Boo Teik*, *supra*, note 30, where a judicial assertion of power over the transfer of criminal cases (from court to court) was met with a constitutional amendment reversing the decision. In Singapore, an intimation by the judiciary that it might wish to review executive detentions under the Internal Security Act, Cap 143, 1985 Rev Ed (*Chng Suan Tze* v *Minister of Home Affairs* [1988] SLR 132) was enough to provoke a constitutional amendment to prevent that from happening: art 149(3).