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READING RIGHTS RIGHTLY: THE *UDHR* AND ITS CREEPING INFLUENCE ON THE DEVELOPMENT OF SINGAPORE PUBLIC LAW

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The utility of invoking international law to inform the crafting of public law arguments depends on the receptivity of a domestic legal system towards international law. There is in Singapore case law a discernible shift in the judicial approach towards handling international legal arguments, from a clumsy dismissal to a more sophisticated handling of how, in particular, human rights law may influence domestic rights adjudication. This article uses the 2008 case of *Re Gavin Millar Q.C.* as a springboard to consider how and if the approach of Singapore courts towards receiving and applying human rights norms in public law cases has changed. It discusses the creeping influence of international human rights norms, such as those embodied in the *UDHR*, in national courts and what this signifies in terms of developing a human rights culture in the thinking and operation of legal actors, such as the bench and bar.

I. RIGHTS ADJUDICATION IN SINGAPORE: MOVING GLACIALLY BEYOND THE LITERAL TEXT AND THE FOUR WALLS?

The task of interpreting law is "a weapon in the arsenal of judicial power"[1]; in reading constitutional bills of rights, national courts in various jurisdictions have resorted to interpreting domestic law to be harmonious with international human rights norms in cases where there is statutory ambiguity; this flows from the presumption that a government intends to act consistently with international law. In this sense, the international rule of law is vindicated through the enforcement of human rights norms by national courts.[2] This type of 'human rights constitutionalism',[3] predicated on the recognition of the intrinsic worth and equality of human beings, as a means of conditioning and humanising the exercise of government power, is a key criterion

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1 M. Shah Alam, "Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study" (2006) 53 Nethl. Int'l L. Rev. 399 at 420.

2 See generally Benedetto Conforti & Francesco Francioni, eds., *Enforcing Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997).

3 Lawrence W. Beer, *Constitutional Systems in Late Twentieth Century Asia* (Seattle & London: University of Washington Press, 1992) at 7.

for evaluating the quality of a constitutional system. Indeed, the former reticence towards human rights as a normative standard by which to legitimate constitutional government is slowly waning. In ratifying the *Charter of the Association of Southeast Asian Nations* ('ASEAN'),[4] Singapore has affirmed "the promotion and protection of human rights"[5] as a facet of good governance.

A consciousness about international instruments like the *Universal Declaration of Human Rights* ('*UDHR*'),[6] a UN General Assembly resolution, was present in the early constitutional discourse of the newly independent Republic of Singapore. In recommending the addition of a qualified constitutional right to property, the 1966 Constitutional Commission referred to the *UDHR*.[7] Indeed, parliamentarians have at various times referred to the *UDHR*, as a political strategy for largely rhetorical effect[8] as well as to construct a legal rights argument.[9] In addition the *UDHR* has been invoked before Singapore courts in adjudicating rights, in recognising the persuasive value of international law norms as a valuable aid to constitutional interpretation. Human rights law rest on a commitment to normative individualism, pursuant to the goal of realising human dignity by providing protective mechanisms to shield the vulnerable individual against the abusive excesses of the leviathan state. This concern is paralleled in the entrenchment of fundamental liberties in constitutional

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4 20 November 2007; text available online: <http://www.aseansec.org/ASEAN-Charter.pdf>. It has been suggested that the *Universal Declaration of Human Rights* should form the basis for the minimal standards that an ASEAN human rights body, provided for in article 14, should safeguard: Sing., *Parliamentary Debates*, vol. 84, "Head N—Ministry of Foreign Affairs, Budget" (28 February 2008) (Professor Thio Li-ann (Nominated Member)).

5 Arts. 1(7); 2(i). Indeed, the Asian states, including Singapore, who adopted the *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8 (7 April 1993), reaffirmed their commitment to principles in the *United Nations Charter* and the *Universal Declaration of Human Rights*.

6 GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/180 (1948) 71.

7 > We find that all the written Constitutions we have looked at specifically provide, as a fundamental human right, the right of every person not to be deprived of his property save in accordance with law and the right to compensation whenever his property is compulsorily acquired. We find also that one of the human rights proclaimed under the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, is the right of an individual not to be arbitrarily deprived of his property.
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> *1966 Report of the Wee Chong Jin Constitutional Commission* at para. 41, reproduced in Appendix D of Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Asia: Butterworths, 1997) [*Wee Chong Jin Commission Report*].

8 Dr. Lee Siew-Choh, arguing that the half-tank petrol rule under the *Customs Amendment Bill* violated article 13 of the *UDHR* which safeguards the freedom of movement: Sing., *Parliamentary Debates*, vol. 54, col. 59 at 73 (7 April 1989).

9 J.B. Jeyaretnam, Sing., *Parliamentary Debates*, vol. 69 at col. 59 (1 June 1998) (arguing that the punishing of caning was "illegal under the *UDHR*."); J.B. Jeyaretnam, Sing., *Parliamentary Debates*, vol. 43, col. 1004 at 1052 (14 March 1984) (criticising a refusal to give passports as violating article 13 of the *UDHR* which safeguards the freedom to leave and return to a country); Lee Siew Choh, Sing., *Parliamentary Debates*, vol. 54, col. 1047 at 1108 (22 February 1990) (arguing that detention without trial violates the basic human right to freedom from arbitrary arrest, enshrined in the *UDHR*); Chiam See Tong, Sing., *Parliamentary Debates*, vol. 47, col. 1378 at 1379 (27 March 1986) (raising Chia Thye Poh's 20 year preventive detention and arguing that "to detain a person arbitrarily is against the provisions of the universal declaration of human rights"); Siew Kum Hong, Sing., *Parliamentary Debates*, vol. 84, "Head Q—Ministry of Information, Communications and the Arts" (29 February 2008) (suggesting that article 19 of the *UDHR* was customary international law and included the freedom of information as a fundamental human right).

bills of rights, which are largely qualified by competing interests such as public goods and the rights and freedoms of others.[10] Thus, a justiciable bill of rights fetters legislative and executive power; judicial review is the legal mechanism for remedying rights infringement; this vindicates the rule of law as "[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."[11]

In principle, the Singapore courts have accepted that as guardians rather than neutral arbiters of constitutionally entrenched individual liberties, which are inalienable in nature rather than carrot and stick privileges,[12] constitutional adjudication should be approached purposively. The canons of statutory construction do not apply in a pedantic fashion.[13] Instead, a "generous interpretation" which affords individuals the "full measure" of their fundamental liberties[14] should be adopted. This observation was made by Lord Wilberforce in 1980[15] in relation to common law systems where the Westminster system of parliamentary government had been adopted, which captures the Singapore experience. He referred to the Constitution of Bermuda, which "was greatly influenced" by the *European Convention of Human Rights*, which was in turn influenced by the *UDHR*. Lord Diplock approvingly reiterated this call for a *sui generis* approach towards interpreting constitutional rights in a seminal Privy Council decision from Singapore, *Ong Ah Chuan v. Public Prosecutor.*[16] In this conception, the function of judicial review is to constrain rather than merely to affirm state power.

To interpret rights rightly, the court should adopt a protectionist or pro-individual presumption in interpreting Part IV of the *Singapore Constitution*, to avoid the enervating force of strict legalism as made manifest in literalist methods of interpretation. As Hannum observed, while Lord Wilberforce's dictum to generously construe individual rights "falls far short of endorsing the substantive norms found in the [*UDHR*], it has provided authority for constitutional interpretations that go beyond a narrowly domestic focus."[17]

However, the promise of a robust reading of rights has not been fully or consistently realised, particularly in instances where courts have embraced high positivism and adopted a deferential attitude towards state organs on the issue of the scope of permissible restrictions on rights. This effectively translates into literalist modes of interpretation which brook no recourse to fundamental or normative principles in

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10 See *e.g.*, *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 S.L.R. 582 at para. 52 (H.C.) [*Chee Siok Chin*].

11 *Chng Suan Tze v. Minister of Home Affairs* [1988] S.L.R. 132 at 156B (C.A.) [*Chng Suan Tze*]. The *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Singapore Constitution*] does not guarantee the right to a judicial remedy to enforce fundamental liberties provisions, despite proposals that this should be included in its bill of rights by the 1966 Constitutional Commission: see the *Wee Chong Jin Commission Report*, *supra* note 7 at para. 44.

12 *Taw Cheng Kong v. PP* [1998] 1 S.L.R. 943 (H.C.) [*Taw Cheng Kong*].

13 *Ong Ah Chuan v. PP* [1980–1981] S.L.R. 48 at 61C-D [*Ong Ah Chuan*].

14 *Ibid.* at 61D.

15 *Minister of Home Affairs v. Fisher* [1980] A.C. 319 at 329 (P.C.).

16 *Ong Ah Chuan*, *supra* note 13.

17 Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995-1996) 25 Ga. J. Int'l & Comp. 287 at 302 [*Status of UDHR*].

construing rights,[18] although there is precedent for requiring 'law' to conform to fundamental rules of natural justice embedded in the common law.[19] This is evident from the deployment of presumptions that rights-restrictive legislation are constitutional, the broad construction of derogation clauses and rejecting the adoption of intrusive standards of review which would subject rights restrictive legislation to tests of reasonableness or proportionality.[20] In some cases, the court appeared to be ceding the primary role of protecting rights to Parliament,[21] which is perhaps more appropriate in a constitutional setting where Parliament is supreme, rather than the Singapore context where Singapore judges wield greater judicial powers than British judges in being able to strike down legislation for being unconstitutional in addition to reviewing administrative action.[22] Furthermore, the cultural appeal to communitarian or statist values in balancing rights with competing interests is supportive of

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[18] In relation to challenges that the 'death row phenomenon' constituted a violation of art. 9(1) of the *Singapore Constitution*, the Court of Appeal stated:

> Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.

Jabar v. PP [1995] 1 S.L.R. 617 at 631B. But see the High Court in *Nguyen Tuong Van v. PP* [2004] 2 S.L.R. 328 at 353 where Kan J. observed there was

> room for debate whether 'so long as it is validly passed by Parliament' refers to the compliance with the processes for passing an Act or to its constitutional validity. I think it relates to both, as the court must be concerned that statutes be properly enacted and do not contravene the Constitution.

[19] *Ong Ah Chuan*, *supra* note 13 at 61I-62A-C:

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of 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, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art. 5) of arts. 9(1) and 12(1) would be little better than a mockery.

[20] *Chee Siok Chin*, *supra* note 10 at para. 87, *per* V.K. Rajah J.:

> Proportionality is a more exacting requirement than reasonableness and requires, in some cases, the court to substitute its own judgment for that of the proper authority. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.

[21] *Rajeevan Edakalavan v. Public Prosecutor* [1998] 1 S.L.R. 851 at 819E-H [*Rajeevan Edakalavan*], *per* Yong Pung How C.J. (arguing that courts were not the appropriate forum to broaden the scope of rights of the criminal accused; rather, the matter was more appropriated addressed by "our representatives in parliament who are the ones chosen by us to address our concerns. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part.")

[22] Lord Diplock in an extra-judicial lecture delivered in 1979 observed that Malaysian courts (and therefore, the Singapore one) enjoyed a "new dimension" in terms of judicial power, as this extended to judicial control of the legislative branch; thus it bore "an even greater responsibility" in developing public law: "Judicial Control of Government" (1979) 2 M.L.J. cxl. Notably, English Courts have broader powers to declare government action incompatible with the European Convention on Human Rights under the terms of the *Human Rights Act 1998* which came into force in 2000, although Parliament remains supreme as courts cannot declare legislation unconstitutional: see generally Ariel L. Bendor & Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model" (2002) 17 Am. U. Int'l L. Rev. 683 at 686.

more extensive restrictions on liberties than may be *de rigeur* in the jurisprudence of courts in western liberal democracies. In this context, public good considerations rather than rights often feature as 'trumps'.[23] In the international context, this appeal to communitarian values takes on a cultural relativist hue in the insistence that there are no "universal standards" and that

> [s]tandards set down in one country cannot be blindly or slavishly adopted and/or applied without a proper appreciation of the context… Standards of public order and conduct do reflect differing and at times greatly varying value judgments as to what may be tolerable or acceptable in different and diverse societies.[24]

Insofar as established human rights standards are a push towards harmonising local with global standards, appeals to particularist values challenge the universalist pretensions of human rights standards. Adherence to the "four walls" of the constitutional text presumptively suggests a lack of receptivity towards transnational law sources, such as foreign law or international law, especially human rights law. Indeed, arguments based on the *UDHR* have been cursorily dismissed, as in *Colin Chan v. Public Prosecutor*, where the High Court demonstrated a parochialist bias towards international sources of law.[25] Yong C.J. stated that the *Singapore Constitution* should be primarily interpreted within its "four walls" and "not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."[26] In point of fact, Singapore courts have actively engaged in international law and foreign cases beyond the four walls, not always to expand rights, but primarily to buttress public order considerations.[27]

Clearly, it is accepted that the valid sources of interpretation transcend a literalist reading of the constitutional text to include *lex non scripta*, or unwritten principles of law, such as those embedded in the common law,[28] which are subject to incremental

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[23] *Chee Siok Chin*, *supra* note 10 at para. 135: "In Singapore, Parliament has through legislation placed a premium on public order, accountability and personal responsibility." In the same case, V.K. Rajah J. stated (at paras. 49-50):

> Evidence of whether the restrictions are to be considered "in the interest" of any of the stated purposes may be, *inter alia*, gleaned from the impugned Act, relevant parliamentary material as well as contemporary speeches and documents. A generous and not a pedantic interpretation should be adopted… The presumption of legislative constitutionality will not be lightly displaced…
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> It is also crucial to note that the legislative power to circumscribe the rights conferred by Art 14 of the Constitution is, *inter alia*, delineated by what is "in the interest of public order" and not confined to "the maintenance of public order". This is a much wider legislative remit that allows Parliament to take a prophylactic approach in the maintenance of public order. This necessarily will include laws that are not purely designed or crafted for the immediate or direct maintenance of public order…

[24] *Chee Siok Chin*, *supra* note 10 at para. 132.

[25] *Colin Chan v. Public Prosecutor* [1994] 3 S.L.R. 662 at 681 [*Colin Chan*]: In relation to the issue of limits on religious freedom which is constitutionally guaranteed and, as defence counsel argued, a universal human right as embodied in the *UDHR*, Yong C.J. stated: "I think the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone."

[26] *Ibid.* at para. 51, quoting with approval the approach adopted by the Malaysian Federal Court in *Government of the State of Kelantan v. Government of the Federation of Malaya* [1963] M.L.J. 355. This was more recently affirmed in *Chee Siok Chin v. PP*, *supra* note 10 at para. 132.

[27] See Thio Li-ann, "'Beyond the Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore" (2006) 19 Colum. J. Asian L. 428.

[28] T.R.S. Allan, "Constitutional Rights and Common Law" (1999) 11 Oxford J. Legal Stud. 453.

judicial development, or custom, stemming from long practice. To the extent that international law is part of domestic law, both written and unwritten international law may influence constitutional adjudication. A clear trend in certain commonwealth jurisdictions is the steady erosion of judicial resistance towards transnational sources of law, which encompasses both international law and foreign case law. Indeed, the *Latimer House Guidelines for the Commonwealth*, which are hortatory in nature, affirm that "[j]udges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth", particularly where countries are "in the process of building democratic traditions." Pursuant to this, judges should "adopt a generous and purposive approach in interpreting a Bill of Rights" and in this context, "[i]nternational law, and, in particular, human rights jurisprudence, can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective."[29]

Such norms may be mandatory or persuasive in nature. They may inform the substance of normative judicial reasoning, provide a binding rule of decision, serve as an interpretive aid in reading rights, form the basis for importing in a new right, or accentuate the weight of the interest safeguarded by an enumerated constitutional right where judicially balanced against competing liberties and public goods.

The utility of invoking international law to inform the crafting and structuring of public law arguments before municipal courts depends on how receptive a domestic legal order is to international law norms. At the international level, this rests on two key issues which determine the inter-relationship between international and domestic law. First, the status of an international legal norm: is the norm 'hard' or 'soft', does it have the status of being *jus cogens* (that is, having a peremptory or non-derogable character), or otherwise. Second, whether municipal courts recognise and accept international law rules automatically, or whether an intermediate act by a government body is required to give international law norms juridical effect within the domestic legal system. The question of what theory explains the binding quality of an international obligation, its status and effect within a domestic legal order, is a question of both international law and foreign relations law. How the content of a substantive international law norm or standard is deployed in public law arguments is a question of constitutional jurisprudence.

These questions were brought into sharp relief in the recent decision of *Re Gavin Millar Q.C.*,[30] which continues the trend of Singapore lawyers citing international instruments to support their case. In particular, this is the latest Singapore case where the *UDHR* was invoked in rights adjudication. There has, over the years, been a discernible shift in judicial approach from a clumsy dismissal to an increasingly sophisticated handling of how international law, especially international human rights law, may apply in domestic courts.

This article uses the recent case of *Re Gavin Millar Q.C.* as a springboard to consider how and if Singapore courts have changed their approach towards the consideration of international human rights norms. It discusses the broader question of

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[29] "Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles" (19 June 1998) at paras. 3-4, available online: <http://cpaafrica.org/uploadedFiles/Information_Services / Publications / CPA_Electronic_Publications / Latimer%20House%20Guidelines.pdf>.

[30] [2008] 1 S.L.R 297 (H.C.) [*Re Gavin Millar Q.C.*].

the creeping influence of international human rights norms in national courts and what this signifies in terms of developing a human rights culture which penetrates into the consciousness of actors such as government bodies, the bench, the bar and citizenry. Insofar as human rights norms are considered relevant to public law issues, it represents a willingness to engage in a dialogue with international norms, to affirm well-established norms and to reject contentious ones. The focus of this article is on international norms which are customary law norms and non-binding standards, rather than treaty-based norms, to which a distinct legal regime applies.[31] This is pertinent because there is support for the view that the *UDHR* in its entirety, or more conservatively, specific *UDHR* norms, embody universally binding customary international law norms. Part II sets the context by offering a brief discussion of the UDHR and its status in international law; it considers how the government and judiciary have treated what Mrs. Eleanor Roosevelt called the magna carta of mankind, and sets out the chief features of Singapore human rights policy. Part III offers a detailed discussion of *Re Gavin Millar Q.C.* and considers the various possible methods of invoking the *UDHR* to advance rights-based constitutional and administrative law arguments. Part IV reflects on the impact of the *UDHR* on Singapore public law as a force for harmonising local public law with global standards,[32] in an age where this document has influenced the drafting of many constitutional bills of rights and rights adjudication in other jurisdictions.

II. The Status of the *UDHR* in International Law and within the Singapore Domestic Legal Order

A. *The Significance of the* UDHR *in Grounding a Juridical Revolution at International Law*

While classic international law after the Westphalian model[33] orders the relationships between co-equal territorial entities called states and characterised a state's treatment of persons within its border as a matter of 'domestic jurisdiction', the *UDHR* which was adopted on 10 December 1948, precipitated a juridical revolution insofar as the rights of individuals received international legal recognition.[34]

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[31] A duallist model applies to treaty law whereby international and municipal law are viewed as two distinct fields such that a treaty must be legislatively incorporated before it has any domestic effect. This is reflected at para. 50 of Singapore's *Initial Report* to the Committee overseeing the *Convention on the Rights of the Child*, CRC/C/51/Add.8 (17 March 2003), which sums up the position thus:

> It must be noted that treaties and conventions do not automatically become part of the law of Singapore. To implement a treaty or convention in Singapore, Parliament has to pass legislation implementing that treaty or convention. The [Convention on the Rights of the Child] is implemented in Singapore via various relevant statutes and subsidiary legislation, as explained in the preceding paragraphs. Any person who claims that his rights under the Convention have been violated may invoke before the Singapore courts the relevant provision in the legislation implementing the Convention.

[32] While Singapore law seeks to harmonise and comport with international standards in the field of commercial law, a particularist or autochthonous slant is adopted in relation to public law issues: see Eugene K.B. Tan, "Law and Values in Governance: The Singapore Way" (2000) 30 Hong Kong L.J. 91.

[33] Christoph Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" (1993) 4 E.J.I.L. 447; W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 Am. J. Int'l L. 866.

[34] See generally Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002) [*A World Made New*].

At its inception, the *UDHR* as a General Assembly Resolution was not meant to be legally binding; it was a hortatory statement, a non-binding statement of aspirations with moral authority designed to provide a "common standard of achievement for all peoples and all nations".[35] This 'magna carta of all humanity'[36] was an elaboration of the human rights provisions in the *United Nations Charter*[37] ('*UN Charter*') but the task of adopting a human rights treaty with binding legal obligations was deferred to a later date.[38] Eventually, what became known as the 'International Bill of Rights'[39] came into being, comprising the *UDHR*,[40] the *International Covenant on Civil & Political Rights*[41] and the *International Covenant on Economic, Social and Cultural Rights*;[42] both covenants came into force in 1976, 10 years after they were adopted.

The *UDHR* is predicated on the principle of human dignity and contains both civil and political rights as well as socio-economic rights. It does not commit one to a radical individualism, as article 29 expressly recognises limits on rights and is an important interpretive guide in referring to responsibilities and the qualification of private rights by public goods such as public order and morality.[43] While secular in intent, the *UDHR* does not espouse an alienating and intolerant atheistic ideology, as the foundational idea for human rights was kept plural. In other words, the *UDHR* does not impose a uniform one-size-fits-all solution for structuring state-society relations.[44] It was drafted by experts steeped in a multitude of traditions:

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35 Preamble to the *UDHR*, *supra* note 6, text available online: <http://www.un.org/Overview/rights.html>. For an in-depth examination, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia: University of Pennsylvania Press, 1999). The Declaration was adopted 46 to zero, with eight abstentions (South Africa, Saudi Arabia and the European Socialist countries).

36 Office of the High Commissioner for Human Rights, "The Universal Declaration of Human Rights", DPI/1937/A (United Nations Department of Public Information, December 1997), online: <http://www.unhchr.ch/udhr/miscinfo/carta.htm>.

37 Article 1(3) of the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7; 59 U.S. Stat. 1031 [*UN Charter*]. Articles 55 and 56 related to duties to undertake single and joint efforts in conjunction with the UN to promote human rights.

38 As Mary Ann Glendon notes, the *UDHR*'s framers did not imagine that they had discovered the entire truth about human rights in 1948, seeking it more as a milestone on a long and difficult journey: *A World Made New*, *supra* note 34 at 231.

39 See Louis Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981).

40 Paul Gordon Laurens, *The Evolution of Human Rights: Visions Seen* (Philadelphia: University of Philadelphia Press, 1998) at 205-257 [*Visions Seen*].

41 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*].

42 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [*ICESCR*]. Both of these Covenants have been fairly widely ratified by more than 140 states: *ICESCR* (142) and *ICCPR* (144) as of May 2000.

43 Article 29 of the *UDHR* reads:

> (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
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> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
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> (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

44 For an assessment of Singapore law and policy against *UDHR* standards, see Kevin YL Tan, "Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection" (1999) 20 Sing. L. Rev. 239.

Chinese,[45] Middle Eastern, Christian, Marxist, Hindu, Latin American and Islamic, in the full consciousness of European Barbarism.[46] Despite the cynical view that many Afro-Asian states, which were then still colonial entities, did not participate in drafting the *UDHR*,[47] undercutting its claim to universal applicability and legitimacy, Afro-Asian states at the 1993 Vienna Human Rights Conference had the belated opportunity to affirm or disavow it, and chose to do the former.[48] Rather than being an exemplar of triumphalist Western imperialism, the *UDHR* was drafted at a time when the moral horror of the Holocaust[49] was still fresh, as was the disaster of European collectivism where Europe had made an idol of the nation-state and ceded absolute powers to their rulers. This abandonment of its moral heritage of natural law and the principle of the intrinsic worth of all human persons paved the way for Nazi and Stalinist oppression. The *UDHR* was thus "a war weary generation's reflection on European nihilism and its consequences…when the Westphalian state was accorded unlimited sovereignty, when citizens of that state lacked normative grounds to disobey legal but immoral orders".[50]

The *UDHR* was drafted at a time just before colonial emancipation was about to accelerate, where Western powers were doing some soul searching with respect to their racist policies abroad and within their borders.[51] It was formulated in universalistic terms, referring to "the equal and inalienable rights of all members of the human family". This universalism was also fortified by article 2's reference to "everyone" as beneficiaries of the *UDHR*'s freedoms, clearly extending to colonial peoples. This "enabled the Declaration to be called Universal, instead of simply International".[52] It remains the only UN human rights instrument which contains the word 'universal' rather than 'international' in its title.

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45 The influential Chinese drafter, P.C. Chang, believed that rights were for everyone, and not just westerners: Glendon, *A World Made New*, *supra* note 34 at 221.

46 The second preambular paragraph refers to the "disregard and contempt for human rights" which had "resulted in barbarous acts which have outraged the conscience of mankind…".

47 Former Singapore Prime Minister Lee Kuan Yew noted that:

> The *UDHR* was written up by the victorious powers at the end of World War II, which meant the US and the British primarily, as well as the French, the Russians and the Chinese. The Russians did not believe a single word of what they signed in the declaration. The Chinese were in such a mess they had to pretend they were espousing the inalienable rights and liberties of man to get American aid to fight the communists, who were threatening them in 1945. So the victors settled the *UDHR* and every nation that joined the UN was presumed to have subscribed to it.

Sandra Burton, "Society vs. the Individual" *Time* (13 June 1993) at 20-21.

48 The preamble of the Vienna Declaration and Programme of Action A/CONF.157/23 (12 July 1993) reaffirms commitment to both the *UN Charter* and the *UDHR*: Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 1999) at 65.

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> The Holocaust laid bare what the world looked like when pure tyranny was given free rein to exploit natural human cruelty. Without the Holocaust, then, no Declaration. But because of the Holocaust, no unconditional faith in the Declaration either. The Holocaust demonstrates both the prudential necessity of human rights and their ultimate fragility.

Ignatieff, *ibid*. at 81.

50 *Ibid.* at 4-5.

51 Paul Gordon Laurens, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination*, 2d ed. (Westview Press, 1996).

52 Jose A. Lindgren Alves, "The Declaration of Human Rights in Postmodernity" (2000) 22 Hum. Rts. Q. 478.

B. *The UDHR—Hortatory or Mandatory?*

Today, the *UDHR* is considered an "authoritative statement of the international community";[53] its influence in shaping many constitutional bills of rights is evident.[54] It continues to be relevant and persuasive as it "reflects profound truths about human nature and the requirements of human dignity."[55] There is even academic support for the view that the *UDHR*, while not originally binding, has evolved and now enjoys the status of being universally binding customary international law ('CIL').[56]

Any international instrument which is not a formally binding treaty can achieve the status of CIL, provided there is sufficient state practice and *opinio juris* to support this conclusion. While it may be premature to insist that the UDHR in its entirety embodies CIL, it is clear that certain *UDHR* norms do.[57] Prudence recommends examining each *UDHR* provision individually to ascertain whether that particular norm embodies customary international law. This is particularly so, since, as the Singapore Foreign Minister observed in 1993:

> Forty-five years after the Universal Declaration was adopted as a "common standard of achievement," debates over the meaning of many of its thirty articles continue. The debate is not just between the West and the Third World. Not every country in the West will agree on the specific meaning of every one of the Universal Declaration's thirty articles. Not everyone in the West will even agree that all of them are really rights.[58]

C. *Singapore and Human Rights Policy*

Though Singapore[59] has often been subject to criticism in relation to its human rights record and for raising a cultural relativist argument that 'Asian values' shape the contours of global human rights norms locally, it is noteworthy that the *UDHR* serves as a useful baseline to engage in human rights discourse, a point which the Singapore government has affirmed. Most recently, Attorney-General Professor Walter Woon stated that the Singapore government did not have any problem with the *UDHR*,

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53 *Filartiga v. Pena-Irala* 630 F. 2d 876 (2d Cir.1980).

54 Specific references to the *UDHR* were made in many post-colonial independence constitutions *e.g.* Senegal, Burundi, the Cameroons. It has been estimated that the *UDHR* has inspired some 90 constitutions: Glendon, *A World Made New*, *supra* note 34 at 228.

55 Jan Martenson (Sweden), quoted in Paul Gordon Laurens, *Visions Seen*, *supra* note 40 at 239.

56 For references to juristic writings which consider the *UDHR* embodies customary international law, see Richard B. Lillich, "The Growing Importance of Customary International Human Rights Law" (1995-1996) Ga. J. Int'l & Comp. L. 1; Richard Bilder, "The Status of International Human Rights Law: An Overview" in James C. Tuttle, ed., *International Human Rights Law and Practice* (Philadelphia: American Bar Association, 1978) 1 at 8, where Bilder wrote: "standards set by the Universal Declaration of Human Rights, although initially only declaratory and non-binding, have by now, through wide acceptance and recitation by nations as having normative effective, become binding international law."

57 Hannum, *Status of UDHR*, *supra* note 17 at 317-351.

58 Foreign Affairs Minister Wong Kan Seng, "The Real World of Human Rights", at the World Conference on Human Rights in Vienna (16 June 1993); Singapore Government Press Release No. 20/JUN 09-1/93/06/16, reproduced in [1993] Sing. J.L.S. 605.

59 For an extended discussion of human rights practice in Singapore, see Thio Li-ann, " 'Pragmatism and Realism Do Not Mean Abdication': A Critical Inquiry into Singapore's Engagement with International Human Rights Law" (2004) 8 S.Y.B.I.L. 41.

that it was a "misconception that Singapore officialdom is against human rights"; what it opposed was "the assumption of some people that when they define what's human rights, that decision is the decision of the rest of humanity." Human rights were and are in danger of becoming a rhetorical slogan to pursue political agendas and politicised causes, such as attempts to frame same-sex 'marriage' as a human rights question.[60] As Hall has astutely pointed out, this is an illiberal manoeuvre, to insulate a contentious matter from political debate by framing the issue as a legal right, and thereby treating the category of human rights as a "convenient sanctuary into which may be placed whatever interests the politically powerful…wish to quarantine from normal contention". This is the consequence of divorcing human rights from its natural law anchorage as an objective reality designed to promote human flourishing, reducing human rights to an "illiberal rhetorical card" which may be deployed to pre-emptively silent dissent.[61] This attempt to fast track a contentious public policy issue from the realm of politics to the domain of law arbitrarily curbs the scope of legitimate debate. Such attempts at proliferating rights threatens to undermine the entire human rights project, precipitating an "inflationary debasement of the human rights coinage"[62] and detracting from the respect due to those natural or human rights which form "indispensable components of the common good", to our common detriment.

Aside from such politically contentious claims, Singapore accepts the concept of human rights, but maintains that the core of established rights remains slim. Questions of interpretation, which can affect the scope and substance of asserted rights, persist and are likely to remain a constant fixture in local and global debate. As Foreign Minister Wong Kan Seng noted in 1993:

> Most rights are still essentially contested concepts. There may be a general consensus. But this is coupled with continuing, and, at least for the present, no less important conflicts of interpretation. Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite gender.[63]

Owing to the priority the government and courts accord to communitarian or statist concerns, the striking of the balance between individual rights and community interests are apt to favour the latter, producing less space for rights-claims. This is framed as an appeal to cultural particularities. Singapore's first Prime Minister Lee Kuan Yew has declared:

> In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did

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60 Loh Chee Kong, "Politics, law and human rights 'fanatics': AG Walter Woon" *Today* (Singapore) (30 May 2008) at 6.

61 Stephen J. Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2001) 12 E.J.I.L. 269 at 305-306.

62 This is because if a category includes everything, without some form of qualifying criteria, it includes nothing and becomes a definition without purpose. See Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 Am. J. Int'l L. 607.

63 Foreign Affairs Minister Wong Kan Seng, *supra* note 58.

> not accord with the customs and values of Singapore . . . The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual… We also put communitarian interests over those of the individual, when sea-front land is acquired for reclamation by cancelling the right of individual sea-front owners to compensation for sea frontage.[64]

This is related to the argument that human rights are contingent insofar as civil-political rights need to be curtailed in order to secure social stability, which is integral to attracting foreign investment, trade and economic development. In this conception, social discipline rather than rambunctious democracy and unbridled individualism is lauded as necessary to secure economic growth and development imperatives. Given this developmentalist and statist ideology,[65] the interpretation and implementation of human rights will differ from what might be the case in western liberal democracies.

III. Invoking the *UDHR* in Singapore Courts: *Re Gavin Millar Q.C.*

The case of *Re Gavin Millar Q.C.*[66] concerned an argument urging that the discretion invested in the courts under section 21 of the *Legal Profession Act*[67] be exercised in favour of the second *ad hoc* application for admission to the Singapore bar of one Mr. Gavin James Millar Q.C.[68] This was to enable Mr. Millar to serve as lead counsel on behalf of the Hong Kong-based Review Publishing Company which publishes the Far East Economic Review. An article about a prominent opposition politician entitled "Singapore's Martyr, Chee Soon Juan," was considered to defame both Singapore Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew. Consequently, two libel suits were brought against Review Publishing Company.[69]

The argument raised before the High Court was that as the plaintiffs were represented by leading Senior Counsel (the Singapore equivalent of the British Queen's Counsel), the defendants, who had apparently been unable to engage any Senior Counsel ('S.C.') to their satisfaction,[70] should be entitled to be represented by a Queen's Counsel ('Q.C.').[71] The defendants unsuccessfully contended that the conditions for admitting a Q.C. under the three-part test stipulated by section 21 were

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64 Prime Minister Lee Kuan Yew (speech at the Opening of the Singapore Law Academy) (31 August 1990), reproduced in (1990) 2 Sing. Ac. L.J. 155 at 156.

65 The most concrete articulation of Asian values may be found in the *Shared Values White Paper* (Cmd. 1 of 1990) issued by the Singapore Parliament. The value "Nation above community and society above self" is lauded as the basis for Singapore's economic success as an insistence on individual rights would have impeded economic development. This is complemented by the admonition to resolve issues through "consensus instead of contention". In further highlighting the imperative of order, "racial and religious harmony" is another shared value.

66 *Supra* note 30.

67 Cap. 161, 2001 Rev. Ed. Sing.

68 The first application was made in *Re Millar Gavin James Q.C.* [2007] 3 S.L.R. 349 (H.C.).

69 The Singapore High Court in *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2008] SGHC 162 (text available online: <http://app.supremecourt.gov.sg/default.aspx?pgID=1081>) has held that the Far Eastern Economic Review article in question did in fact defame Minister Mentor Lee Kuan Yew and Prime Minister Lee Hsien Loong: Zakir Hussein, "FEER defamed PM, MM" *Straits Times* (Singapore) (23 September 2008).

70 *Re Gavin Millar Q.C.*, *supra* note 30 at paras. 15-20, 25, 33, 41.

71 *Ibid.* at paras. 30-51.

met, all due consideration being given to "the circumstances of the case" which they argued was "of sufficient difficulty and complexity" to warrant admitting a Q.C. The court accepted the contention that Mr. Millar possessed "special qualifications or experience for the purpose of the case", having litigated libel suits before the House of Lords. In particular, Mr. Millar was involved in the leading case of *Reynolds v. Times Newspaper*[72] where the new defence of qualified privilege relating to neutral reportage had been canvassed; this was precisely the defence the defendants wished to raise in this present case. Tay Yong Kwang J. considered that "novelty does not equate difficulty and complexity,"[73] giving a clear vote of confidence to a maturing local bar[74] where he felt that any reasonably competent lawyer would be able to handle a novel defence developed in another common law jurisdiction, and to contextualise it.[75] Indeed, he observed that in a battle of "David-and-Goliath" proportions, shepherd boys armed with stones and slings could still defeat heavily armed, seasoned soldiers of gigantic proportion.[76]

What is of particular note is an argument raised by the defendant, calling upon the court to take into account the need to have a "level playing field" between both parties to the defamation suits. Article 10 of the *UDHR* was invoked to substantiate this argument. It reads:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The defendants argued that as a member of the United Nations, Singapore was bound by the terms of the *UN Charter* "to respect the standards laid down in the Universal Declaration of Human Rights."[77] Essentially, they were arguing that allowing the admission of a Q.C. was necessary to satisfy the principle of equality of arms, which was "a fundamental part of any fair trial guarantee."[78] Citing two decisions of the European Court of Human Rights ('ECtHR'),[79] the defendant borrowed the definition by the ECtHR in relation to the fair trial guarantee in article 6 of the

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72 [2001] 2 A.C. 127 (H.L.).

73 *Re Gavin Millar Q.C.*, *supra* note 30 at para. 38.

74 Tay J. noted that s. 21 of the *Legal Profession Act* would look "increasingly incongruous" as the number of Senior Counsel appointments increased and that it was meant to be transitional, adding that Singapore was "steadily progressing towards the day" when Parliament should delete it: *ibid.* at para. 47.

75 *Ibid.* at paras. 36-40, 44.

76 *Ibid.* at para. 49.

77 *Ibid.* at para. 8.

78 *Ibid.* at para. 8.

79 *De Haes and Gijsels v. Belgium* (1997) 25 E.H.R.R. 1 [*De Haes*]; *Steel and Morris v. United Kingdom* (2005) 41 E.H.R.R. 22. Notably, Singapore courts have displayed reticence over decisions from the European Court of Human Rights or U.K. cases influenced by ECtHR jurisprudence, as in *Chee Siok Chin*, *supra* note 10 at 590, 614-616. This reticence has not been universal: see Lee J.C. in *Malcolmson Nicholas Hugh Bertram v. Naresh Kumar Mehta* [2001] 4 S.L.R. 454 at para. 57, citing Millet L.J., *Fine Robert v. McLardy Eileen May* [1998] EWCA 3003 (6 July 1998). Notably, whether or not U.K. cases are persuasive may turn on the issue whether a legal development is based on the common law or influenced by the ECHR: see Rajendran J. in *Goh Chok Tong v. Jeyaretnam J.B.* [1998] 1 S.L.R. 547 at 561-562 (H.C.) (quoting *Derbyshire County Council v. Times Newspapers* [1993] 1 All E.R. 101). So too, Belinda Ang J. in *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 S.L.R. 675 (H.C.) had rejected the *Reynolds* defence on the basis that it was not law in Singapore, characterising this as based on art. 10 of the *European Convention on Human Rights*. Mr. Peter Cuthbert Low for the defendants

European Convention on Human Rights.[80] This was to the effect that the equality of arms principle was "a component of the broader concept of a fair trial" which "requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."[81] They argued "it was likely that this principle would be breached where there was disparity between the respective levels of legal representation."[82] If so, it was contended that the court, considering "the expertise, seniority and number of lawyer[s] representing the Plaintiffs,"[83] should take this into account in considering the application. This illustrates the use of international human rights norms in a definitional manner, to define the content of a fair trial guarantee by interpreting a right, whether this has a constitutional or quasi-constitutional status.

Central to the success of this type of argumentation is the need, firstly, to establish the legal basis for the right to a fair trial, whether this is a legal right grounded in international law or public law, or both. Secondly, argument must be offered to persuade the court on the scope and substantive content of such a right, the meaning of the 'equality of arms' principle, which is the subject of a healthy body of case law and academic discussion[84] as a facet of a fair trial guarantee, and its applicability to the facts of the case.[85] The chief concern here is with the reception, rather than the interpretation of international standards and their influence on the development of Singapore public law jurisprudence.

This section explores the manner in which the *UDHR* as an international standard was invoked before a domestic court, and the possible bases upon which the *UDHR* may be given legal effect within the Singapore legal order. It reflects upon the influence international standards, whether legal or merely of 'soft law' status, may have upon constitutional interpretation and public law jurisprudence in a Commonwealth

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argued that *Reynolds* "was a development of the common law": *Re Gavin Millar Q.C.*, *supra* note 30 at paras. 11-12.

80 Article 6 of the *European Convention on Human Rights* provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

81 Quoting from *De Haes*, *supra* note 79 at para. 2 of the Appellant's Case, *In the Matter of Section 21 of the Legal Profession Act (Cap 161) between Gavin James Millar and Lee Hsien Loong and Lee Kuan Yew*, CA70/2007/J (on file with author) [Appellant's Case].

82 *Re Gavin Millar Q.C.*, *supra* note 30 at para. 8.

83 Appellant's Case, *supra* note 81 at para. 5.

84 See *e.g.*, Gabrielle McIntyre, "Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia" (2003) 16 Leiden J. Int'l L. 269; for a recent case involving the principle of equality of arms as an aspect of a fair trial, and a discussion of that right asembodied under art. 14 of the *ICCPR* in relation to the production of certain documents, see *Ragg v. Magistrate's Court of Victoria & Corcoris* [2008] V.S.C. 1 (24 January 2008), available online: <http://www.austlii.edu.au/au/cases/vic/VSC/2008/1.html>.

85 The High Court rejected the proposition, citing *Godfrey Gerald Q.C. v. UBS AG* [2003] 2 S.L.R. 306 at paras. 33-34, that if one side was represented by a Senior Counsel, the other side was entitled to have a Queen's Counsel, to ensure equality of arms. This was not the sole determinative factor as the entirety of the factual and legal matrix of the case had to be considered to ascertain whether there were sufficiently complex issues to warrant the admission of a Q.C.: *Re Gavin Millar Q.C.*, *supra* note 30 at para. 42.

country whose judges have declared a commitment to evolving an autochthonous public law model, grounded on 'local conditions' as well as general principles of fairness and reasonableness.[86]

A. *The Status of International Law within the Singapore Domestic Legal Order in General*

1. *International law and the silent constitution*

One of the virtues attending the adoption of a written constitution is the ability to set out legal arrangements with precision and to address legal questions consciously and deliberately. This stands in contrast with the slow, incremental, evolutionary ethos of the English constitutional system; England remains one of the few countries in the world without a written constitution, though this factor alone does not determine the quality of constitutionalism practiced.

Many of the world's younger constitutions crafted in the 1990s during the post-Cold War wave of constitution-making contain explicit provisions, ordering the inter-relationship between international law and domestic law.[87] For example, the 1991 Constitution of Romania makes explicit provision in relation to general treaties in article 11.[88] In relation to the rights and liberties of citizens, article 20 provides that constitutional rights "shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights" and other international human rights treaties Romania is party to. It provides that international regulations take precedence over national laws in the event of inconsistencies, "unless the Constitution or national laws comprise more favourable provisions." Similarly, section 23 of the Timor Leste Constitution of 2002 expressly instructs judges that, "[f]undamental rights enshrined in the Constitution shall not exclude any other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights."[89]

The *Singapore Constitution* is silent on the matter of international law and in general, it appears that the approach of the Singapore government towards international law parallels that of the British approach.[90] That is, treaties must be explicitly incorporated by a statute to have domestic effect,[91] in accordance with the dualist approach which views international and municipal law as distinct spheres. Singapore knows no doctrine of immediately applicable self-executing treaties.

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86 *Tang Kin Hwa v. Traditional Chinese Medicine Practitioners Board* [2005] 4 S.L.R. 604 at paras. 27-28 (H.C.).

87 See *e.g.*, Eric Stein, "International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions" (1994) 88 Am. J. Int'l L. 427.

88 The text of the Romanian Constitution is available online: <http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=1>.

89 The text of the Timor Leste Constitution is available online: <http://www.constitution.org/cons/east_timor/constitution-eng.htm>.

90 See generally Andrew J. Cunnigham, "The European Convention on Human Rights, Customary International Law and the Constitution" (1994) 43 I.C.L.Q. 537.

91 See *e.g.*, *J.H. Rayner Ltd. v. Department of Trade & Industry* [1990] 2 A.C. 418 (H.L.).

2. *Maturing judicial approaches: sources of international law*

The position is different in relation to CIL, which is unwritten and universally binding. It composes the objective component of general, consistent state practice observable over a certain duration, and the subjective component of *opinio juris*, the belief of states that a norm is binding because it is a legal norm, as opposed to a matter of comity. This is apparent from a reading of case law. The clumsy nationalist approach evident in the 1994 case of *Colin Chan*[92] has given way to a more sophisticated and nuanced treatment of international law in latter-day judicial reasoning.

In *Colin Chan*, the defendants in challenging the constitutionality or legality of executive action taken against a religious sect, the Jehovah's Witnesses, under the *Undesirable Publications Act* (Cap. 338) and the *Societies Act* (Cap. 311), had referred to article 18 of the *UDHR*[93] in raising an argument based on article 15 of the *Singapore Constitution*;[94] both are religious freedom guarantees. This was baldly dismissed by the High Court.[95]

More than a decade later, the High Court and Court of Appeal demonstrated a more 'cosmopolitan' outlook and willingness to engage with customary international human rights law sources and the possible ramifications this might have for Singapore case law, in *Nguyen Tuong Van v. PP*.[96] In particular, what was clear was that no subsequent act of incorporation was needed before a CIL norm could be judicially considered, provided "[a]ny customary international law rule must be clearly and firmly established before its adoption by the courts."[97] In other words, the court has to determine whether an international norm is widely accepted enough to be deemed legal binding on the court. This suggests a monist[98] approach towards the reception of international law in the domestic context, provided that the status of the norm is clear. The court distinguished between 'hard' international law sources like treaties or CIL, which are legally binding, and 'soft' international law instruments, such as the non-binding *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*,[99] which the participants at the 6th Conference of Chief Justices of Asia and the Pacific, including the Singapore Chief Justice, signed on 19 August 1995. The statement underscores the high value of the judicial institution in being "indispensable" to implementing *UDHR* rights and that courts

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92 *Supra* note 25.

93 The article reads:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

94 Article 15(1) of the *Singapore Constitution*, *supra* note 11, reads: "Every person has the right to profess and practise his religion and to propagate it."

95 *Colin Chan*, *supra* note 25 at 681I-682A.

96 [2004] 2 S.L.R. 328 (H.C.) [*Nguyen* (H.C.)]; [2005] 1 S.L.R. 103 (C.A.) [*Nguyen* (C.A.)]. For an analysis of the case, see Thio Li-ann, "The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in PP v Nguyen Tuong Van (2004)" (2004) 4 O.U.C.L.J. 213; Lim Ching Leng, "The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v PP" [2005] Sing. J.L.S. 218.

97 *Nguyen* (C.A.), *supra* note 96 at 127.

98 See J.G. Starke, "Monism and Dualism in the Theory of International Law" (1936) 17 British Y. B. Int'l L. 66.

99 *Nguyen* (H.C.), *supra* note 96 at paras. 99-101.

must have jurisdiction to determine the justiciability of a matter. Defence counsel argued that sentencing was a justiciable issue and that in criminal trials, the accused, to be afforded the equal protection of the law, had to have his sentence passed by an independent and impartial tribunal. This was inconsonant with the legislative scheme under the *Misuse of Drugs Act* (at issue in *Nguyen*) which imposes a mandatory death sentence in relation to certain drug-trafficking offences.

Kan J. did not find anything in the Statement specifically relating to mandatory death sentences and noted that Counsel failed to explain "how the Statement, which does not have the force of a treaty or a convention, assists the accused's argument that mandatory death sentences are illegal."[100] Soft international law, it appears, carries little persuasive weight in the local context.[101]

3. *Evaluating a putative CIL norm*

The courts will also comb through evidence in order to ascertain if sufficient consensus as to the content of the CIL norm exists. For example, the High Court in *Nguyen* accepted the contention that article 36(1) of the *Vienna Convention on Consular Relations* ('*VCCR*') (1963), to which Singapore was not then a party,[102] was legally binding in Singapore as a matter of CIL,[103] accepted into the common law.

Certain factors were singled out, to support this conclusion. Kan J. noted that 167[104] states were parties to the treaty and cited juristic writings to underscore the point that the conclusion of the *VCCR* was "the single most important event in the entire history of the consular institution."[105] He observed that there was "an established" practice, which Singapore subscribed to, for an arresting state to inform the consular office of the accused's state of nationality. Further, this had in fact been done in Singapore in this specific case, when the Australian High Commission was informed of the arrest of Nguyen, an Australian national, for drug trafficking.[106] In addition, this action had been taken pursuant to a Central Narcotics Bureau directive as part of standard operating procedures.[107] From this, Kan J. considered it "reasonable to infer that the other law enforcement agencies in Singapore would have similar directives"[108] especially since the directive "suggests the acceptance of the obligations set out in article 36(1)", given that "Singapore holds herself out as a responsible member of the international community and conforms with the prevailing norms of the conduct between."[109] To cement this finding pertaining to the subjective mindset of the Singapore government, that is, to find *opinio juris*, Kan J. agreed that article 36(1) of the *VCCR* was applicable to Singapore since the Prosecution, "which is in a

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[100] *Ibid.* at para. 101.

[101] Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 I.C.L.Q. 850.

[102] Singapore acceded to the *VCCR* in April 2005, without reservations, after *Nguyen* was decided.

[103] *Nguyen* (H.C.), *supra* note 96 at para. 31.

[104] *Ibid.* at para. 33.

[105] Citing Luke T. Lee, *Consular Law and Practice*, 2d ed. (Oxford: Clarendon Press, 1991) at 26; *Nguyen* (H.C.), *supra* note 96 at para. 33.

[106] *Nguyen* (H.C.), *ibid*. at para. 34.

[107] *Ibid*. at paras. 34-35.

[108] *Ibid*. at para. 35.

[109] *Ibid*. at para. 36.

good position to have knowledge of Singapore's position on this issue, did not assert the contrary."[110] Silence is indicative of tacit consent as to the binding quality of a legal norm.

4. *Applying an established CIL norm*

However, the nature of the judicial enquiry does not end here as two further questions must be addressed, in importing and applying a CIL norm.

The next question to consider is whether the accepted legal norm is breached, on the facts of the case. Again, the Court of Appeal confirmed the holding of the High Court in *Nguyen* that while article 5 of the *UDHR* embodied binding CIL, such that the reference to "law" in article 9 of the *Singapore Constitution* included applicable rules of 'international law', the content of this norm was disputed insofar as death by hanging was not considered to breach the prohibition against torture or to cruel, inhuman or degrading treatment or punishment. There was insufficient state practice on this point both in relation to the inability of the appellant "to show a specific customary international law prohibition against hanging as a mode of execution" as well as insufficient evidence "at this time to show a customary international law prohibition against the death penalty generally."[111] In this respect, a UN Commission on Human Rights Report was cited as evidence that the number of countries which have abolished the death penalty are about equal to retentionist countries.[112] This type of UN document is not legally binding, but serves as a material or evidential source providing evidence that there is a lack of consensus with respect to the asserted authority of a norm. To buttress this conclusion, the Court of Appeal also referred to a U.S. case, which the High Court[113] had considered, to show that other jurisdictions did not accept that death by hanging was cruel, inhuman treatment or punishment.[114] Demonstrating departures from a putative norm undermines an argument that a particular state practice is generally followed, or that it enjoys broad consensus.

B. *Invoking Article 10 of the* UDHR *in* Re Gavin Millar Q.C.

1. *Is Article 10 of the* UDHR *binding on Singapore courts?*

This section considers the purpose for which Article 10 of the *UDHR* was invoked in *Re Gavin Millar Q.C.*, and the legal status of this international norm within the domestic legal order.

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[110] *Ibid.* at para. 37.

[111] *Nguyen* (C.A.), *supra* note 96 at para. 92.

[112] *Question of the Death Penalty: Report of the Secretary-General Submitted Pursuant to Commission Resolution 2002/77*, UN ESCOR, 59th Sess, UN Doc E/CN.4/2003/106 (2003) (as at 1 December 2002), cited in *Nguyen* (C.A.), *ibid.* at para. 92.

[113] *Nguyen* (H.C.), *supra* note 96 at para. 107.

[114] The case in point was the U.S. Ninth Circuit Court of Appeals decision of *Campbell v. Wood* 18 F. 3d 662 (1994): see *Nguyen* (H.C.), *ibid.* at para. 107; *Nguyen* (C.A.), *supra* note 96 at para. 93.

There are several possibilities which go to explaining why the *UDHR* might be binding on Singapore. This matter was not addressed in any length in the judgment or in the submissions of the defendant.

First, the defendants argued that "Singapore, as a member state of the United Nations, was bound by the United Nations (UN) Charter to respect the standards laid down in the Universal Declaration of Human Rights."[115] The *UN Charter* is a multilateral treaty to which Singapore is a state party. The *UN Charter* is also the constitutional basis for the United Nations Organisation. The argument seems to be that flowing from Singapore's treaty obligations is the duty to comply with an authoritative document issued by the UN General Assembly, which is not formally binding as a matter of UN law.[116] In other words, does the *UN Charter* create any positive human rights treaty obligations for Singapore?

The *UN Charter* is the first international instrument containing the words "human rights" which feature about 7 times in the text.[117] Human rights were identified as a principle and purpose of the new international body and under article 55(c), the UN was enjoined to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Under article 56, all UN members pledged "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." However, proposals to include a list of rights in the *UN Charter* text failed and at the time it was adopted, human rights had not been codified. Indeed, the adoption of the *UDHR* three years later by 46 votes, with no dissenting votes and 8 abstentions was the first step towards the completion of what came to be known as the 'International Bill of Rights', which remains the core of the corpus of human rights norms today. Thus, the reference to "human rights" in the *UN Charter* text is general and abstract, without concrete elaboration as to content or scope. Attempts to invoke the human rights provisions in the *UN Charter* as a basis for challenging the discriminatory nature of Californian land law in respect of alien groups (here, Japanese) failed in *Sei Fujii v. State of California*.[118] It was held that the *UN Charter* did not create any specific treaty-based human rights obligations for UN member-states, only general objectives, and that it was not self-executing.[119] The argument that the *UN Charter* had automatically become part of the supreme law of the land, paramount to conflicting state law, was rejected.

The *UDHR* has been considered an authoritative interpretation of *UN Charter* obligations. Nonetheless, while the *UDHR* may possess great moral weight, as a form of 'soft law,'[120] one may safely conclude that no legal (as opposed to moral)

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[115] *Re Gavin Millar Q.C.*, *supra* note 30 at para. 8.

[116] General Assembly resolutions are recommendatory in nature: Article 10 of the *UN Charter*, *supra* note 37.

[117] Notably the Dumbarton Oaks draft of the *UN Charter* only contained a singular reference to human rights, buried in the text in Chapter IX, which addressed arrangements for international economic and social co-operation. Its more prominent position in the final text was largely owing to the lobbying efforts of the small- and medium-sized nations at San Francisco Conference in 1945. See Laurens, *Visions Seen*, *supra* note 40 at 170. See Lawrence Preuss, "Some Aspects of the Human Rights Provisions of the Charter and their Execution in the United States" (1952) 46 Am. J. Int'l L. 289.

[118] 38 Cal. 2d 718; 242 P.2d 617 (Sup. Ct. 1952) (California Supreme Court).

[119] For a contrary view, see Quincy Wright, "National Courts and Human Rights—The Fujii Case" (1951) 45 Am. J. Int'l L. 70 at 77.

[120] By this I mean not legally binding in a formal sense.

obligation to obey *UDHR* standards may be said to flow from Singapore's treaty obligations as party to the *UN Charter*. While there is nothing to stop a domestic court from referring to a General Assembly Resolution as a normative, persuasive guide,[121] or indeed, nothing to prevent a state from constitutionalising an international best practice, it is not formally binding as a matter of law.[122]

The second possibility is that although the *UDHR* at its inception as a General Assembly Resolution was recommendatory rather than legally binding in nature, it has since attained the status of CIL. A normative standard, may, where embraced and practiced by states, acquire the status of binding and universally applicable law where the formative criteria for CIL are present. Indeed, it was specifically argued that Singapore courts "are bound to give this guarantee (of a fair trial) because of Singapore's obligations under *UDHR* Art 10."[123]

2. *The juridical status of the* UDHR

If we assume that the juridical status of the article 10 *UDHR* fair trial guarantee is indeed CIL, two further issues arise. First, how is it used in public law argumentation? Obviously, this implicates the methodology of constitutional interpretation, particularly in relation to legitimate sources of law. Presumably, international law norms may be used to interpret existing constitutional or statutory rights, to imply a constitutional right, or possibly, to ground an independent right to equality of arms as a facet of a human right to a fair trial. Alternatively, international law may be a relevant consideration in interpreting statutory law, such as the powers contained in section 21 of the *Legal Profession Act*. The second issue relates to the status of international customary law *vis-à-vis* domestic law, assuming its reception and applicability on the facts.

3. *Invoking a* UDHR *norm to inform the content of an existing right and to accentuate weightage in the balancing process*

When counsel invoked article 18 of the *UDHR* in conjunction with article 15 of the *Singapore Constitution* in *Colin Chan*,[124] this was presumably to indicate the high status of a civil liberty which finds parallel expression as a universally recognised

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[121] Ian Chin J. in the Malaysian High Court (Kuching) decision of *Nor Anak Nyawai v. Borneo Pulp Plantation* [2001] 6 M.L.J. 241 at 297 referred to the non-binding *UN Draft Declaration on the Human Rights of Indigenous Peoples* quite extensively. See Gregory J. Kerwin, "The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts" (1983) Duke L.J. 876.

[122] Malaysian courts have rejected the relevance of the *UDHR* to domestic law. In *Merdeka University Berhad v. Government of Malaysia* [1981] 2 M.L.J. 356, in discussing the *UDHR*, the court stated it was "not a legally binding instrument", had no "obligatory character" and "is not part of our municipal law"; it considered that the standards contained therein (art. 26 in relation to educational rights) were not justiciable. This was affirmed in *Mohamad Ezam v. Ketua Polis Negara* [2002] 4 M.L.J. 449, where the Malaysian court stated the *UDHR* was a non-binding General Assembly Resolution, and its standards were only of "persuasive value" in relation to the right of legal representation. It decided there was no need to have regard to the *UDHR*, "as our own laws backed by statutes and precedents….are sufficient for this court to deal with the issue of access to legal representation."

[123] Appellant's Case, *supra* note 81 at para. 5.

[124] *Supra* note 25.

human right. This might translate into an accentuation of the weight accorded to the existing constitutional religious freedom guarantee against competing rights and public goods. Invoking customary human rights law is in itself not dispositive, though it may lend weight to an existing right and affect the balancing process in a domestic legal issue which deals with human rights.

International norms may not only affect the judicial balancing process by accentuating the weight of a rule; it may also shape the content of a rule or even provide a rule of decision, by which international law 'controls' domestic law by overturning inconsistent legal rules. The Australian High Court in the seminal case of *Mabo v. Queensland (No. 2)*[125] demonstrated the increasing permeability of international law in relation to the fundamental values of the common law, which Lord Diplock has described as embodying an ethos of "fair dealing".[126] The Court observed that "international law is a legitimate and important influence" on common law development, particularly in the field of "universal human rights", although there is no strict conformity between common law and international law. The racist and discriminatory property law concept of *res nullius* was considered to be "contrary both to international standards and to the fundamental values of our common law"; since civil and political rights were impugned, such a rule demanded "reconsideration."

In *Nguyen Tuong Van v. PP*,[127] article 5 of the *UDHR* was invoked as an interpretive aid to inform the scope of the article 9 right not to be deprived of life or personal liberty, save in accordance with "law". It has been accepted in *Ong Ah Chuan v. PP*[128] that references to "law" in the context of the Part IV fundamental liberties refer to a system of law which comports with "fundamental rules of natural justice". Legislative and executive power seeking to restrict constitutional rights, which enjoy an elevated situation in the legal hierarchy, is thus restrained by these moderating principles of fairness.The attempt in *Nguyen* to urge the court to read in standards of humanity into the normative substance of "law", such as to render death by hanging to be a deprivation of life not in accordance to a humane standard of law, failed. While it was accepted that article 5 of the *UDHR* had the status of binding CIL, its substantive content was disputed.

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125 (1992) 175 C.L.R. 1.

126 Lord Diplock, "Judicial Control of Government" [1979] 2 M.L.J. cxl. This affirmation of fundamental values extant in the common law, a form of 'common law constitutionalism', may be traced back to Sir Edward Coke C.J.'s observation in *Dr. Bonham's Case* (1610) 8 Co. Rep. 107 at 114 (C.P.) (Eng.), that the

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

This indicates a legal limit to parliamentary sovereignty.

127 *Supra* note 96.

128 *Ong Ah Chuan*, *supra* note 13 at 61-62. See Andrew Harding, "Natural Justice and the Constitution" (1981) 23 Mal. L. Rev. 226; T.K.K. Iyer, "Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 Mal. L. Rev. 213. These principles have not been substantially developed since 1981: Thio Li-ann, "Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?" [1997] Sing. J.L.S. 240. In the Malaysian context, see *Kekatong v. Danaharta Urus* [2003] 3 M.L.J. 275 (C.A.) where the Court of Appeal declared that the rule of law was housed in the article 8(1) equal protection clause, and thus "law" in the constitutional text referred to the principle of the rule of law. This approach was rejected by the apex Federal Court: *Danaharta Urus v. Kekatong* [2004] 2 M.L.J. 257 at 268.

So too, article 3 of the *UDHR* was invoked by the Bangladesh Supreme Court in *Tayazuddin v. The State*[129] to inform the substantive content of the article 32 constitutional guarantee[130] of the right to life, liberty and security of the person; this was for the purpose of elaborating that the right to life, liberty and security of a person not only applied to a criminally accused person, but also a victim of crime. In this case, bail was refused to the accused who had thrown acid at the victim, a 15-year old girl, on the basis that if the accused was allowed bail, the victim would not be able to give evidence without fear. International human rights norms were thus invoked to underscore the duty of the state to protect its citizens and ensure their security. Implicitly, the Court appeared to be recognising article 3 as a CIL norm, and treated it as a binding rule of decision, lending content to a guaranteed right within a legal order where CIL is directly applicable. In so doing, human rights standards can positively enhance the fairness of the administration of justice within a domestic legal order.

In *Re Gavin Millar Q.C.*, counsel for the appellants notably invoked article 19 of the *UDHR*—which guarantees freedom of expression—in raising the *Reynolds* defence to libel, stating that "the courts will want to consider the conformity of the common law of qualified privilege as applied in Singapore with the relevant international and constitutional norms".[131] This shows a consciousness on the part of counsel of the utility of invoking transnational sources of law to underscore the importance of an existing constitutional right, in this case, the article 14 guarantee of free speech. This may accentuate the weight accorded to freedom of speech in the adjudicatory process by emphasising its importance, thus influencing the interpretive process.

For the purpose of this application, the fair trial guarantee in article 10 of the *UDHR* was invoked; however, there is no parallel constitutional guarantee to a fair trial in Part IV. Thus, it was not invoked to inform the content of an existing constitutional right or to emphasise the importance of such a right.

4. *Invoking customary human rights law to buttress the discovery of an implied right to a fair trial?*

In *Re Gavin Millar Q.C.*, no specific constitutional right was invoked in aid of the argument of what a fair trial required. While the *Singapore Constitution* does contain criminal due process rights, it does not specifically enumerate a right to a fair trial. However, it may be possible to judicially declare an implied right to a fair trial, on the assumption that Part IV of the *Singapore Constitution* is not exhaustive,[132] drawing from recognised constitutional principles, history, or international law.

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[129] 21 B.L.D. (H.C.D.) 2001, 503; I.L.D.C. 479 (B.D. 2001) (Bangladesh Supreme Court, High Court Division).

[130] This states that no one shall be deprived of life or personal liberty save in accordance with law.

[131] Applicant's Written Submissions (Filed on 9 May 2007 by Mr. Peter Cuthbert Low of Peter Low Partnership) at para. 34, Originating Summons No. 621 of 2007/H (on file with author).

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

This would require a form of constitutional interpretation which is not stranded on the reefs of strict textualism nor run aground on the rocks of legal positivism. Indeed, the Privy Council, in a case arising out of Singapore, *Haw Tua Taw v. PP,*[133] set out a template of factors to inform the constitutional construction of Part IV liberties, along the lines of a broad interpretive palette which included reference to unwritten fundamental rules of natural justice, inherent in the concept of "law", requiring that criminal procedure not be "obviously unfair." In evaluating what is or is not unfair, recourse could be had to international instruments like the *UDHR* as well as comparative constitutional practices, including those of civilian systems "in many countries of the non-communist world"[134] where judges have investigatory functions. This eschews a formalist literalism and suggests that universally applicable principles may be found and confirmed by global practice.

Judicial approaches on this point are inconsistent as the decisions in certain cases have shown a judicial impatience towards reading in auxiliary rights to facilitate the enjoyment of an existing fundamental right, on the basis that this would entail an unwarranted degree of "adventurous extrapolation."[135] However, these same judges who have refused to read in extra-textual rights have nonetheless been willing to read in extra-textual statist principles which buttress, rather than limit state power.[136] Hence, it is fair to say that non-literalist approaches remain extant in the existing Singapore case law, and may be further developed in future cases.

There is judicial precedent for such an approach from other Commonwealth jurisdictions, on the basis that such an implied fundamental right can be derived, not out of thin air or preferred personal philosophy, but from recognised fundamental constitutional principles. This appeal to principle is an attempt to distinguish the realm of objective 'law' from subjective 'politics' and to thwart any impression that the court is descending into the political thicket. For example, the Australian High Court has found that the Australian Constitution does contain implied freedoms, such as the freedom of political communication. This was derived from the system of representative government embodied in sections 7 and 24 of the Constitution.[137] English judges have also declared the existence of quasi-constitutional rights at common law, such as a right to a judicial remedy;[138] such rights were considered "logically prior" to the democratic process as creatures of the common law which could only be abrogated by specific statutory provision. Calling a right 'constitutional' in this context entails according a "special weight" to this right, to acknowledge its superior status in the legal hierarchy, following the logic of the constitutional ordering of interests. It does not entail the indefeasibility of that right.

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133 [1981] 2 M.L.J. 49.

134 *Ibid.* at 76F.

135 *Mazlan v. PP* [1993] 1 S.L.R. 512 at 516C-D (in relation to a putative right to silence which was not given "explicit expression in the Constitution"). See also *Rajeevan Edakalavan*, *supra* note 21; *Sun Hongyu v. PP* [2005] 2 S.L.R. 750.

136 See *e.g.*, Yong C.J.'s creative declaration that the "sovereignty, integrity and unity of Singapore" constituted the "paramount mandate" of the *Singapore Constitution*: *Colin Chan*, *supra* note 25 at 684F-G.

137 *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106. See also attempts to imply rights from the judicial power clause in *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1.

138 Laws J. in *R v. Lord Chancellor, ex p Witham* [1997] 2 All E.R. 779 at 783-784.

One could conceivably construct an implied right to a fair trial and the equality of arms principle, through deducing this from the judicially accepted constitutional principle of the rule of law.[139] Indeed, by way of analogy, it may be argued that the opinion of the then Attorney-General, quoted with approval by a government minister, is that a right to vote may be derived from the constitutional provision that "provides for a regular General Election to make up a Parliament", thereby establishing "representative democracy." Thus, "the right to vote is fundamental to a representative democracy" and given effect by the *Parliamentary Elections Act* (Cap. 218, 2007 Rev. Ed. Sing.).[140] Similarly, if indeed article 10 of the *UDHR* embodies a customary international human right to a fair trial, it may be helpful to invoke it to ground an argument that a right to a fair trial exists as an implied constitutional right or a common law liberty.[141]

5. *Relevant considerations and the regulation of administrative discretion*

Quite apart from grounding or supplementing a rights-based argument, international law norms may form part of the interpretive matrix of legal sources which informs the interpretation of a statutory provision. In interpreting legislation, a CIL rule may be invoked in two ways: firstly, through the operation of the presumption that statutory words should be interpreted in a manner compatible with CIL.[142] If a country has declared its support of the *UDHR*, as Singapore has,[143] this may be taken as evidence of government policy such that courts are presumptively to act in compliance with international obligations or foreign policy principles. Secondly, CIL may form part of the background against which statutory interpretation takes place,[144] together, in the case of administrative law, with common law principles of fairness and rationality.

In the context of section 21(1) of the *Legal Profession Act*, as the court is directed, in hearing *ad hoc* admissions applications, to have "regard to the circumstances of the case", a relevant consideration in the exercise of this statutory discretionary power might be the principle of equality of arms as an integral aspect of the article 10 *UDHR* fair trial guarantee. This could draw from the presumption that the government should act in a manner consistent with its international obligations, assuming that the equality of arms principle is embodied in a customary international norm. Singapore courts have not displayed receptivity to 'soft law' norms contained in a non-binding text as a useful resource for determining the content of good governance in Singapore. In

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[139] See *Chng Suan Tze*, *supra* note 11 at 156. It would of course be more desirable to enact a constitutional right to a fair trial rather than to rely on judicial declarations of implied constitutional guarantees.

[140] Sing., *Parliamentary Debates*, vol. 73, col. 1720 at 1722-1726 (16 May 2001).

[141] There has been no practice in Singapore where customary human rights law suffices to establish a free-standing or independent civil right.

[142] In *R v. Keyn* (1876) 2 Ex. D. 63 at 85, Sir Robert Phillimore stated: "[I]t is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law." See also *Salomon v. Customs and Excise Commissioners* [1967] 2 Q.B. 116 at 143H (C.A.); *Saad Diriye and Osorio v. Secretary of State for the Home Department* [2001] EWCA Civ 2008; (2002) A.C.D. 59 at paras. 15-16, 72.

[143] "No country has rejected the Universal Declaration of Human Rights." Foreign Affairs Minister Wong Kan Seng, *supra* note 58.

[144] See *Alcom Ltd v. Republic of Colombia* [1984] A.C. 580 at 597G-H (H.L.); *R v. Bow Street Magistrate, ex p Pinochet (No. 3)* [2000] 1 A.C. 147 at 203E (H.L.).

Nguyen[145] for example, the High Court was dismissive when counsel referred to the non-binding *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* to argue that judges should have a role in relation to the death sentence, in urging reform of the mandatory death penalty sentence.[146] 'Soft law' norms are hence more likely to be given judicial short shrift.

Nonetheless, if article 10 of the *UDHR* embodies a CIL law norm, and if the equality of arms principle, as applied in this case, seeks to achieve equilibrium between counsel by allowing one side to engage a Queen's Counsel, where the other side has the Singaporean equivalent in the form of a Senior Counsel, it is a relevant consideration to be taken into account in the decision-making process. Implicitly, on the facts of the case, the Court appeared to consider this argument in reaching the conclusion that the equality of arms principle did not require that one side be allowed to have a Queen's Counsel when the other side had a Senior Counsel; while this was a relevant factor, it was not determinative. The entirety of circumstances had to be examined. In other words, the 'equality of arms' is not a stand-alone right which operates to require that one party be allowed to engage a Queen's Counsel when the other side has a Senior Counsel;

Tay J. in *Re Gavin Millar Q.C.* in considering precedent[147] thought that the principle of a level playing field "must be read in the context where the court had already decided that the factual and legal matrix of the case was sufficiently complex and difficult to warrant the admission of a QC…"[148] In so doing Tay J. appeared to be defining the context of the equality of arms principle primarily in terms of the factual and legal complexity of the case, rather than the relative standing of counsel, noting that "[i]f the defendants' arguments on equality of arms were correct, every case in court would need opposing lawyers of the same or nearly the same stature and seniority. That, in my opinion, would lead to absurd consequences."[149] As an abstract principle, the idea of the principle of equality of arms requiring counsel of roughly equivalent experience and standing on both sides would be absurd, but on the facts of this particular case, given the difficulty the appellants encountered in finding senior counsel willing to follow clients' instructions in presenting the case, perhaps more weight should have been placed, in assessing whether the playing field was in fact equal, on the fact that the appellants were facing "arguably Singapore's foremost litigator" with the backing of the "vast resources of Drew and Napier",[150] a leading law firm. This is of course a debate over the scope or precise content of a relevant rule, assuming its applicability.

6. *The status of a CIL norm in domestic Singapore courts*

Where an international standard enjoys the status of customary international law, following a monist system, this is part of Singapore common law and legally binding. Furthermore, if the content of the norm is clear and has been breached on the facts

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145 *Nguyen* (H.C.), *supra* note 96 at 358-359.
146 *Ibid.* at paras. 99-101.
147 *Re Beloff Michael Jacob Q.C.* [2000] 2 S.L.R. 782.
148 *Re Gavin Millar Q.C.*, *supra* note 30 at paras. 42-43.
149 *Ibid.*
150 *Ibid.*

of a case, it remains to be determined what status it enjoys in the domestic legal hierarchy of norms, in the absence of constitutional pronouncement.

It appears that Singapore courts have followed the British approach that an applicable CIL norm is 'trumped' by an unambiguous statutory provision; the Court of Appeal in *Nguyen* affirmed this proposition, citing the cases of *Chung Chi Cheung v. The King*[151] and *Collco Dealings Ltd. v. Inland Revenue Commissioners.*[152] Thus, even if the CIL rule prohibiting inhumane treatment and punishment encompassed death by hanging, the *Misuse of Drugs Act* would prevail in the event of such inconsistency. This flows from the assumption that an imported CIL norm has the same status as a common law norm, which can be trumped by the clear words of a statute. The appropriateness of adopting the British approach may be questioned, on the basis of the fact that this operates within a constitutional order where Parliament is supreme, whereas the *Singapore Constitution* is the supreme law of the land.[153]

Hence, what if a customary human rights law norm[154] is applied to interpret a constitutional provision? It gives flesh or substance to a constitutional law right, which is "inalienable", insofar as "the constitution is supreme."[155] The CIL norm in this context is not being applied as a free-standing rule but in the interpretation of a constitutional right, whether enumerated or implied; if international law is used to interpret a constitutional standard, it is part of the apex law; as part of a higher order constitutional norm, it is superior in status to a statutory rule. If this analysis is correct, then an Act of Parliament which is inconsistent with a constitutional right is invalid; while a statute prevails over common law, the *Singapore Constitution* prevails over a statute and if the meaning of the *Singapore Constitution* can be interpreted through the lens of international law norms, customary human rights law is positioned to play a more influential role in the development of public law rights jurisprudence.

Even if Singapore courts can only import in CIL norms in relation to the development of the common law, given the constitutional allocation of foreign relations powers to the executive and the acceptance that the appropriate judicial posture in this field is that of deference,[156] such deference would be inappropriate where an *jus cogens* norm is involved. This is a peremptory norm which embodies fundamental

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151 [1939] A.C. 160 at 167-168 (P.C.).

152 [1962] A.C. 1 (H.L.).

153 Art. 4 of the *Singapore Constitution* states that the Constitution is the supreme law and that "any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

154 A useful summary of generally accepted customary human rights law norms may be found in the *Third Restatement of the Foreign Relations Law of the United States*, § 702 (American Law Institute, 1997) which reads:

> A state violates international law if, as a matter of state policy, it practices, encourages or condones(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination or (g) a consistent pattern of gross violations of internationally recognised human rights.

155 *Taw Cheng Kong*, *supra* note 12 at 965.

156 Notably, Menon J.C. in *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2007] 2 S.L.R. 453 at 490-491 (H.C.) rejected a "highly rigid and categorical approach" towards determining whether instances of executive decision-making were not justiciable; rather, the intensity of judicial review would vary depending upon the issue and context and upon common sense, though there were clearly "certain questions" in respect of which there was "no expectation" that an "unelected judiciary will play any role."

international values which no state can contract out of and in respect of which a conflicting treaty is void.[157] *Jus cogens* norms are subject to an even more stringent requirement of consensus than what would be needed to establish that a norm has the character of a universally binding customary international law norm.[158]

IV. Conclusion

In a globalising world where international human rights law is an item in the menu of the transnational judicial conversations[159] taking place between certain judges across borders, the invocation of international instruments before national courts is instructive in demonstrating that domestic courts have a role in enforcing international law. International law has breached the ramparts of parochialist slants of 'national sovereignty'-based arguments as a barrier to the applicability of international law norms, even if the weight of influence these norms exert have yet to be significant in the Singapore context.

To develop public law jurisprudence in a justice-oriented manner, judges can legitimately consider international human rights law in reading constitutional rights and statutory provisions. This may contribute towards the effective realisation of constitutional rights or administrative principles of legality.

Clearly, the legal culture of resistance towards international law is slowly eroding, even if this trend is not proceeding apace. Singapore courts have not clearly pronounced upon the inter-relationship between CIL and domestic law, although a monist sensibility is evident, insofar as clearly established CIL norms automatically form part of the Singapore domestic legal order, without need for a further act of incorporation. International law forms another accepted point of reference for judges. This opens the door to the possibility of incorporating human rights provisions in national law, as a basis for expanding existing rights as these evolve, or for grounding implied rights. In the Singapore context, however, recourse to the *UDHR* in future is likely to relate primarily to civil and political rights, as the *Singapore Constitution* does not contain socio-economic rights, and the securing of human welfare is characterised as a function of government obligation and programmes rather than justiciable entitlements.

What remains unclear is the question of legal hierarchy, whether customary international law norms, imported to interpret constitutional provisions, prevail or are subordinate to statutory law in the event of a conflict. It is hoped that future judicial pronouncement on this point will take full cognisance of the point that the *Singapore Constitution* affirms the principle of constitutional supremacy, rather than that of parliamentary supremacy. The judiciary must develop the common law of Singapore "for the common good", which includes buttressing constitutionalism, rather than merely legalism, in regulating the exercise of state power. In this task, it is

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[157] Article 52 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331.

[158] Generally accepted *jus cogens* norms remain a limited category of hierarchically superior norms, including genocide, piracy, slaving, torture, wars of aggression and the prohibition against the use of force by states. See generally Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008).

[159] See generally, Christopher McCrudden, "Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 Oxford J. Legal Stud. 499.

duty bound "to consider and give effect to any rule necessarily concomitant with the civil and civilised society which every citizen of Singapore must endeavour to preserve and protect".[160] As a responsible member of the international community, this must embrace the upholding of the international rule of law as a 'gentle civilizer of nations'[161] which, in an Age of Rights,[162] extends to how governments treat individuals within their jurisdiction.

[160] *Nguyen* (C.A.), *supra* note 96 at para. 88.

[161] I borrow this phrase from the title of Martti Koskiniemmi's book, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2004).

[162] Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).