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WESTMINSTER CONSTITUTIONS AND IMPLIED FUNDAMENTAL RIGHTS: EXCAVATING AN IMPLICIT CONSTITUTIONAL RIGHT TO VOTE

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Constitutional texts are products of conscious deliberation, although Westminster-based Constitutions are not exhaustive. This article examines whether there are implied rights in the *Singapore Constitution*, given express ministerial statements affirming the constitutional status of an implied right to vote. It evaluates the debates concerning the legal status of voting rights and explores the possible theoretical bases which may ground an interpretive method supporting the 'declaration' of implied fundamental rights, the legitimacy and nature of constitutional implications. Attention is paid to Australian experience in the judicial derivation of an implied right to freedom of political communication in considering methods of constitutional implications. It considers whether it is beneficial and desirable to have an express constitutional right to vote, what its content might be and reflects on the Singapore model of representative democracy and citizenship.

I. INTRODUCTION

A constitutional text is a product of conscious deliberation. Drafting the basic law provides an occasion to formulate the government framework with clarity in a single documentary text. This founding document delimits jurisdictional boundaries between state organs and expresses a normative justice-based vision of state and society, often found in the Preamble or Bills of Rights.

The root of the *Singapore Constitution*, belonging to that specie known as Westminster constitutions,[1] may be traced in part to the Malaysian Federal Constitution, a product of Anglo-Malayan drafting.[2] On Singapore's subsequent exodus from the Federation on 9 August 1965, its state constitution was retained with modifications.[3]

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1 Lord Diplock in *Hinds v. The Queen* [1977] A.C. 195 at 212 [*Hinds*]. See generally A.J. Harding, "The Westminster Model Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States" (2004) O.U.C.J. 143.

2 *Loh Kooi Choon v. Government of Malaysia* [1977] 2 M.L.J. 187 (Federal Court).

3 At Independence, the *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Singapore Constitution*] was not contained in a single documentary text but in three instruments: the 1963 State Constitution (amended by the *Constitution of Singapore (Amendment) Act*, No. 8 of 1965), *Republic of Singapore Independence Act* (1985 Rev. Ed.), No. 9 of 1965 [*RSIA*] and the Malaysian Federal Constitution insofar as the *RSIA* made this applicable to Singapore. See Kevin Tan, "The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day" (1989) 1 Sing. Ac. L.J. 1 at 6-17.

Former British colonies importing the Westminster system of parliamentary government also received written constitutions seeking to articulate the main features of a system which developed in the context of a supreme Parliament. While these instruments expressly codified and constitutionalised certain British conventions,[4] the drafting practice associated with Westminster constitutions[5] left much "to necessary implication from the adoption in the new constitution of a government structure".[6]

Constitutional texts are not exhaustive. Wheare describes a constitution as "the collection of rules which establish and regulate or govern the government"; some of these are "partly legal" in the sense of being judicially enforceable while other rules are "partly non-legal or extra-legal",[7] such as political conventions. Neither do authors of constitutional texts set out to exhaustively stipulate all rules which order government and its inter-relations with individuals and general society. Recourse must be had to the *lex non scripta*, the 'unwritten constitution', composing the unarticulated ideas and processes accepted as a necessary part of an adopted government system.[8] An adopted Westminster system of government cannot be understood apart from its core organising principle of parliamentary democracy which shapes the rules, practices and institutions of government. Such a theory may have undergone modification through indigenisation.[9] This unwritten law is left to be excavated

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4 *E.g.*, articles 25 and 26 of the *Singapore Constitution* codified the British convention relating to the appointment and termination of the office of Prime Minister, based on the democratic principle of commanding the confidence of the majority of the House.

5 The Westminster model in the narrower sense means:

> a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control.

Stanley de Smith, *The New Commonwealth and its Constitutions* (London: Steven & Sons, 1964) at 77.

6 Lord Diplock in *Hinds, supra* note 1. In *Liyanage v. The Queen* [1966] 2 W.L.R. 682 (P.C.) [*Liyanage*], an implied clause vesting judicial power exclusively in the courts was inferred from history, practice and the non-exhaustive drafting methodology employed.

7 K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1951) at 1. The latter refers to "usages, understandings, customs or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called". See also the idea of 'soft constitutional law' in Thio Li-ann, "Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony" [2004] Sing. J.L.S. 414. In writing of the English Constitution, A.V. Dicey distinguishes between enforceable constitutional rules (law of the constitution) and what he calls the non-enforceable "conventions of the constitution" which consist of "conventions, understandings, habits or practices…[which] regulate the conduct" of various government bodies. Unwritten law could be found in the common law while constitutional conventions such as parliamentary procedure could be written: A.V. Dicey, *Introduction to the Study of the law of the Constitution*, ed. Roger E. Michener (Indianapolis: Liberty Fund, 1982) at 82-83, text available online: <http://files.libertyfund.org/files/1714/Dicey_0125_EBk_v4.pdf>.

8 In the Canadian context, see Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; in the U.K. context, see T.R.S. Allan, "In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law" LSE Legal Studies Working Paper No. 5/2009, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331375>. In the New Zealand context, Sir Robin Cooke in *Fraser v. State Services Commission* [1984] 1 N.Z.L.R. 116 at 121 [*Fraser*] suggested there were certain common law rights which go "so deep that even Parliament cannot be accepted by the Courts to have destroyed them".

9 See generally Thio Li-ann, "Singapore: The Indigenisation of a Westminster Import" in Clauspeter Hill & Jorg Mezel, eds., *Constitutionalism in Southeast Asia* (Singapore: Konrad Adenauer Stiftung, 2008) at 237; Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: 40 Years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009).

or discovered by ministerial statement or authoritative, presumably final judicial declaration, which proceeds from arguments of constitutional theory[10] framing an interpretive method. This entails departing from strict textualism, in referring to extra-textual sources including the common law and custom. Unwritten provisions may be drawn from free-standing political values independent of the constitutional text, or derived from a contextual reading of various constitutional provisions, bound by some unifying theory.

While Singapore courts have been unwilling to declare unwritten ancillary rights[11] and have rejected the Indian basic features doctrine,[12] there is a strand of constitutional reasoning that interprets the word "law" in the fundamental liberties chapter (Part IV) as referring to fundamental rules of natural justice[13] which temper exercises of state power. Singapore courts have identified various extra-textual constitutional principles or liberal values including the rule of law[14] and separation of powers,[15] as well as statist or power-reinforcing values such as declaring the "sovereignty, unity and integrity" of Singapore is the Constitution's "paramount mandate".[16]

The issue of whether the *Singapore Constitution* contains any implied rights came to the forefront when a question concerning the status of the right to vote was posed during the February 2009 Budget parliamentary debates. Part IV does not contain such a right and the *Parliamentary Elections Act*[17] appears to regulate rather than create the right to vote.

The Law Minister unequivocally stated the right to vote is an implied constitutional right, "arising from the various provisions in the *Constitution*, including Articles 65 and 66 which provide for a general election within 3 months after every dissolution of Parliament".[18] It was implied from the general structure of the *Constitution* and the system of parliamentary democracy it established. In other words, it was functionally necessary to ensure a working system of democratic accountability.

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[10] Fallon describes this mode of interpretation as pushing beyond "what could plausibly be considered the plain meaning of constitutional language. Instead, they claim to understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible". This is distinguished from making "value arguments" as an interpretive method, where direct appeal is made to "moral, political or social values or policies" making claims about "what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires", or indeed of original intent or precedent: Richard H. Fallon Jr., "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv. L. Rev. 1189 at 1189-1209.

[11] The Courts have refused to find ancillary rights associated with enumerated rights, such as the right to be told of the Art. 9(3) right to counsel: *Rajeevan Edakalavan v. Public Prosecutor* [1998] 1 S.L.R. 815 (H.C.); *Sun Hongyu v. Public Prosecutor* [2005] 2 S.L.R. 750 (H.C.).

[12] *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461. See David Gwynn Morgan, "The Indian "Essential Features" Case" (1981) 30(2) I.C.L.Q. 307. This was rejected in *Teo Soh Lung v. Minister for Home Affairs* [1989] S.L.R. 499 (H.C.).

[13] *Ong Ah Chuan v. Public Prosecutor* [1981] 1 M.L.J. 64 at para. 82 (P.C.) [*Ong Ah Chuan*].

[14] *Chng Suan Tze v. Minister of Home Affairs* [1988] S.L.R. 132 at 156B-C (C.A.), affirmed in *Lim Teng Ee Joyce v. Singapore Medical Council* [2005] 3 S.L.R. 709 at 714 (H.C.).

[15] *Cheong Seok Leng v. Public Prosecutor* [1988] S.L.R. 565 at 575D (H.C.) [*Cheong Seok Leng*]; *Law Society of Singapore v. Tan Guat Neo Phyllis* [2007] SGHC 207 at para. 43.

[16] *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 S.L.R. 662 at 684F-G (H.C.) [*Colin Chan*].

[17] Cap 218A, 2007 Rev. Ed. Sing. [*PEA*]

[18] Law Minister K. Shanmugam in response to the question I raised in my capacity then as a Nominated Member of Parliament: Sing., *Parliamentary Debates*, vol. 85 ("Budget Head R—Ministry of Law") (13 February 2009) (Mr. K. Shanmugam).

This statement dealt the *quietus est* to the High Court's odd pronouncement in *Taw Cheng Kong v. Public Prosecutor* that the right to vote was a privilege, akin to a subsidy conferred by the legislature as "expressions of policy and political will"[19] rather than an "inalienable" constitutional right. It would be alarming if voting rights were afforded such modest legal protection, given their centrality to the democratic enterprise.

This article first examines the debates concerning the legal status of the right to vote; secondly, it explores the possible theoretical bases which provide the gateway for an interpretive method supporting the 'declaration' of implied fundamental rights, the legitimacy and nature of constitutional implications. Attention is paid to the Australian experience in the judicial derivation of an implied right to freedom of political communication, from the democratic structure of government. This category of implied freedom may be conceptualised more as a restraint on federal legislative power rather than a justiciable entitlement, enforceable at the instance of the individual right-holder. Arguably, this idea of an implied right as a restraint on legislative power is an appropriate analogy with the implied right to vote in the Singapore context. Thirdly, the debate is situated within the broader context of the Singapore model of constitutional democracy, in considering whether it is beneficial and desirable to amend the Constitution to include an express right to vote, which chapter this should be included in, and what implications this might have for the content of the right to vote. Given that there has been ministerial recognition of an implied right to vote, does this open the door to find other implied constitutional rights based on constitutional structure? These may be distinguished from the types of new or expanded rights stemming forth from the judicial legislation of activist judges who draw from their own subjective judicial philosophies to infer new rights from existing open-textured provisions (such as "personal liberty") which give off invisible radiations or formless penumbras, raising questions of democratic legitimacy. The article is structured along the lines of this inquiry and concludes with some reflections on the model of representative democracy and citizenship extant in Singapore.

II. Contextualising the Enquiry: The Legal Status of the Right to Vote

A. *A Lost Opportunity? Rejecting the Recommendation of the 1966 Constitutional Commission*

The 1966 Constitutional Commission had recommended entrenching the right to vote as a "fundamental right" in the form of "the right to elect a government of

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[19] *Taw Cheng Kong v. Public Prosecutor* [1998] 1 S.L.R. 943 at para. 56 (H.C.) [*Taw Cheng Kong* (H.C.)]: Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties—not stick and carrot privileges. To the extent that the constitution is supreme, those rights are inalienable. Other privileges such as subsidies or the right to vote are enjoyed because the legislature chooses to confer them—these are expressions of policy and political will. But the rights are not enjoyed in exchange for 'a certain code of conduct from … citizens whether they be within or without the country'. So insofar as the prosecution's theory suggests that constitutional rights are bargained rights, conferred not by supreme law but by common exchange with the State, I think it is legally inaccurate.

their choice as expressed in general elections held at reasonable periodic intervals by secret vote".[20] The chief justification for this proposal was the relative infancy or immature democracy of a "barely one year old" independent nation. The Report noted that citizens had only exercised the right to vote twice in general elections, in 1959 and 1963 respectively. Hence:

> The people of Singapore have thus had little experience of general elections nor can it be safely assumed that they have grown up to cherish as an inalienable right, the right to be governed by a government of their own choice, expressed in periodic and general elections by universal and equal suffrage and held by secret vote…we do not consider it safe to assume that a significant proportion of the people of Singapore will be able to realise, until it is too late to prevent it, that any inroads have been made into the democratic system of general elections by a future government intent on undermining first and ultimately destroying the practice of democracy in Singapore.[21]

The difference between an *ordinary* law and a *fundamental*, paramount law is each requires a simple and special parliamentary majority respectively, to be amended. The more important a constitutional interest is, the greater protection it warrants. The Commission also recommended entrenching all fundamental rights provisions to require alteration only "if supported" by a two-thirds parliamentary majority and a two-thirds electoral majority at a referendum.[22]

However, neither were these suggestions taken up, relegating voting rights to statutory regulation under the *PEA*. Nor did Parliament adopt commission proposals to include an abridged right to property,[23] a specific right to a judicial remedy[24] and a prohibition against torture, cruel and inhumane treatment.[25]

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[20] Report of the Constitutional Commission 1966 (Singapore: Government Printer, 1966) at para. 43; reproduced in Kevin Y.L. Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 2d ed. (Asia: Butterworths, 1997) at Appendix D [*Wee Report*]. See generally Li-ann Thio, "The Passage of a Generation: Revisiting the 1966 Constitutional Commission" in Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: 40 Years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009) 7 [Thio, *Passage of a Generation*].

[21] *Wee Report, ibid*. On the secrecy of the vote, the commission noted:

> In this connection we think it is right that we should draw attention to the provisions of s 39(3) of the Singapore, Parliament Elections Ordinance (Chapter 53). This subsection requires that 'each ballot paper shall have a number printed on the back and shall have attached a counterfoil with the same number printed on the face'. It appears to us that this provision is inconsistent with the right to secrecy of the vote.

[22] *Ibid*. at para. 18.

[23] *Ibid*. at paras. 41-42; Sing., *Parliamentary Debates*, vol. 25, col. 1276 at 1295—1297 ("Report of Constitutional Commission, 1966") (15 March 1967) (Mr. Lee Kuan Yew).

[24] Art. 19 of the Guyana Constitution was proposed as a model. The High Court would have jurisdiction to hear and determine applications and to give appropriate enforcement orders: *Wee Report, ibid.* at para. 44.

[25] It may be argued that this is binding on Singapore as a matter of customary international law. Li-ann Thio, "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(2) O.U.C.L.J. 213; C.L. Lim, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v. Public Prosecutor*" [2005] Sing. J.L.S. 218; Thio Li-ann, "Reading Rights Rightly: The UDHR and its Creeping Influence on the Development of Singapore Public Law" [2008] Sing. J.L.S. 264.

B. *Confusion in 2001: Is Voting a Privilege or a Right?*

The juridical status of the right to vote was debated before Parliament in 2001, arising from an adjournment motion moved by Non-Constituency Member of Parliament ("MP"), Mr. J.B. Jeyaretnam.[26] This was an apparent response to some queries he had received from members of the public in response to a *Straits Times* article reporting on a *PEA* amendment which facilitated, *inter alia*, overseas voting.[27] The article opined that because the government had not previously facilitated overseas voting, the vote "is in the never-never land between being a right and a privilege".[28] Mr. Jeyaretnam considered this "much of a flip-flop". The significance is this: 'rights' rank higher than 'privileges' in the hierarchy of interests; in particular, constitutional rights are inalienable.

The confusion is not surprising, given the lack of clarity amongst the parliamentarians themselves. For example, a government MP said that "While voting is not a constitutional right, it is nonetheless a strong symbol of citizenship, a mark of belonging—a privilege limited only to those who are citizens of a certain age. It is also a duty, as voting is compulsory". As such, it should be regarded as "a cherished privilege, to be taken away only if a citizen forfeits it through his or her own unacceptable conduct".[29] Another described voting as a "very basic privilege"[30] while yet another conflated the issue by stating "Voting is a fundamental right and privilege of an adult citizen".[31]

In contrast, opposition MPs like Mr. Chiam See Tong described the vote as "a very important right" as "[i]t is only when a citizen has chosen his parliamentary representative that he can have a say in the affairs of his country".[32] Mr. Low Thia Khiang described a vote as "sacred" and "a basic right of the people"[33] while a Nominated MP considered voting "a fundamental right for citizenship".[34]

Mr. Jeyaretnam argued the right to vote was contained in the article 14 free expression clause and facilitated by relevant statutes.[35] This is unconvincing. A firmer basis must be found for a constitutional right to vote. Free speech and voting rights

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[26] Sing., *Parliamentary Debates*, vol. 73, col. 1720 at 1720ff ("Is Voting a Privilege or a Right") (16 May 2001) (Mr. J.B. Jeyaretnam).

[27] See Minister of Home Affairs Wong Kan Seng in Sing., *Parliamentary Debates*, vol. 73, col. 1506 at 1506–1517 ("Parliamentary Elections (Amendment) Bill") (19 April 2001) (Mr. Wong Kan Seng) [Parliamentary Elections (Amendment) Bill parliamentary debates on 19 April 2001].

[28] Chua Lee Hoong, "It's your duty to vote, but it's not a right" *The Straits Times* (Singapore) (25 April 2001), text archived online: <http://www.thinkcentre.org/article.cfm?ArticleID=726> (visited 1 May 2009).

[29] Mr. Chin Tet Yung, Parliamentary Elections (Amendment) Bill parliamentary debates on 19 April 2001, *supra* note 27 at col. 1517.

[30] Mr. S. Iswaran, *ibid.* at col. 1530.

[31] Sing., *Parliamentary Debates*, vol. 73, col. 1576 at 1579 ("Parliamentary Elections (Amendment) Bill") (20 April 2001) (Mr. Goh Chong Chia) [Parliamentary Elections (Amendment) Bill parliamentary debates on 20 April 2001].

[32] Mr. Chiam See Tong, Parliamentary Elections (Amendment) Bill parliamentary debates on 19 April 2001, *supra* note 27 at col. 1522.

[33] Mr. Low Thia Khiang, Parliamentary Elections (Amendment) Bill parliamentary debates on 20 April 2001, *supra* note 31 at col. 1577–1578.

[34] Mr. Norris Ong, *ibid.* at col. 1583.

[35] *JB Jeyaretnam, supra* note 26.

certainly shape the democratic quality of a polity and voting itself is "an expression of a political choice". However, the right to vote is a political right with its own substantive content distinct from the civil right of free speech.[36] From section 5 of the *PEA*, Mr. Jeyaretnam considered that the stipulated category of persons[37] "shall be entitled to have their names on the register". On this basis, he questioned the constitutional validity of section 43(5) and 43(8) which regulated the removal of non-voters from the register and their reinstatement.[38] The logic was that an inalienable right inhered in a citizen and could only be secured, rather than created, by positive law.

The qualifications and evidence of qualifications to vote is set out in the *PEA* which refers to voting as a right and duty.[39] Section 5 stipulates the requirements for entitlement to vote and section 37 provides the register of elections is conclusive evidence of such entitlement. Home Affairs Minister Mr. Wong Kan Seng noted that "voting as a right comes with the responsibility to exercise it for the best interest of Singapore, one's family and the community at large".[40] Mr. Wong read out the Attorney-General's opinion before Parliament:

> While the Constitution does not contain an expressed declaration of the right to vote, I have been advised by the Attorney General…that the right to vote at parliamentary and presidential elections is implied within the structure of our Constitution. We have a parliamentary form of government. The Constitution provides for regular general elections to make up Parliament and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right.[41]

C. *Clarification and Confirmation in 2009: An Implied Constitutional Right to Vote Affirmed*

In 2009 the issue whether the right to vote was constitutional or statutory was raised during the Budget debates. It was argued that:

> A right of fundamental importance should be recognised as a fundamental right and constitutionally entrenched. Only the most important rights or interests are constitutionalised and receive maximum legal protection as part of the supreme law. The right to vote is not an ancillary or new-fangled right; it is fundamental and long-established.[42]

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36 *Ibid.* at col. 1721.

37 This being all Singapore citizens over 21 years of age, resident in Singapore on the 1st of July in any year.

38 *JB Jeyaretnam, supra* note 26 at cols 1722–1723.

39 S. 38(2) of the *PEA*, *supra* note 17.

40 Sing., *Parliamentary Debates*, vol. 73, col. 1720 at 1728 ("Is Voting a Privilege or a Right") (16 May 2001) (Mr. Wong Kan Seng).

41 *Ibid*. at col. 1726.

42 Sing., *Parliamentary Debates*, vol. 85 ("Budget Head R—Ministry of Law") (12 February 2009) (Professor Thio Li-ann).

Furthermore, the right to vote is the "Political Right of rights, a Super-Right necessary for democracy to function authentically".[43]

The right was not "a boon from the state" but was, in the words of the 1966 Constitutional Commission, one "deserving to be cherished as an inalienable right".[44]

It was argued the *PEA* merely secured the right to vote in facilitating elections by identifying who the People are for voting purposes, in maintaining a register of electors, and by regulating the conduct of elections. Its constitutional status by implication could be supported from the fact that "Westminster based Constitutions have found implied basic rights to political communication, these were considered embedded in the Constitution which established government based on representative democracy". If the right to vote was merely statutory, its explicit elevation to constitutional status was urged to affirm its primary importance and to communicate a fundamental value to the citizenry.

The question put was whether, given that the Attorney-General's 2001 opinion was "authoritative [but] not determinative under our system of separation of powers", the Law Minister would invoke the article 100 process to seek an advisory opinion from the constitutional tribunal to clarify matters. Alternatively, whether the desirable step of amending the constitution to include an express right to vote under the Part IV could be taken. Furthermore, "while the Constitution provides for regular elections, it does not guarantee direct elections, secret voting or universal equal suffrage. Such details are basic and should be succinctly expressed in a constitutional voting clause, not left to Statute".[45]

The Law Minister stated unequivocally that the "power of citizens to vote cannot be a privilege" as this would imply "some institution superior to the body of citizens" empowered to grant such privilege. It was therefore a right, noting that "Representative Democracy is the very essence of our political system; and voting is the foundation of Representative Democracy".[46] Further, it was an implied right "arising from the various provisions in the Constitution", including Articles 65 and 66. As a Constitutional right it enjoyed "the highest possible legal protection".

However, the Law Minister was not receptive to the proposal to expressly entrench the right to vote in the *Constitution*, noting that the *Singapore Constitution* "is essentially a product of British drafting" which typically is not prolix but rather, concisely sets out "the basic philosophy".

Minister Shanmugam noted that the lack of experience Singaporeans had with general elections then motivated the 1966 Constitutional Commission to recommend including a constitutional right to vote. However, Singapore had since experienced "10 general elections… with about 95% turnout at each election", eradicating any concern "that our citizens may not know the importance of voting or may not exercise it". Thus, the "raison d'etre of the Wee Commission's recommendations no longer exist". He added that articles 65[47] and 66 "are themselves intended to be

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43 *Ibid.*
44 *Ibid.*
45 *Ibid.*
46 *Law Minister K. Shanmugam, supra* note 18.
47 This provides for the prorogation and dissolution of Parliament.

entrenched".[48] Voting was a legal obligation because the government wanted citizens to vote. In essence, his opinion was that a paper right to vote did not necessarily provide more protection than jurisdictions where no right to vote existed.[49] What matter were good governors, institutions and an educated citizenry.

Four points underscoring the Law Minister's reasoning are worth highlighting.

First, a normative theory was referenced, to justify the right to vote, namely, an overarching notion of 'representative democracy' and popular sovereignty as the ultimate legitimating source of power. This was not an appeal to abstract theory but the political philosophy historically associated with Westminster parliamentary government, even if the constitution lacks precise details on how to implement representative democracy.

Second, there was reliance on the text in deriving the right to vote from both structure (Westminster system) and specific provisions (articles 65 and 66). No direct appeal to mere socio-political values to reach a politically desired conclusion was made, measured against some standard external to the Constitution.

Third, drinking from the stream of constitutional pragmatism,[50] the experience of holding regular elections during "the last 50 years of post colonialism" was considered proof that "regardless of all the high flown language in the Constitution", it was "the mettle of the people and its leadership which will decide whether the Constitution becomes a living document or a near worthless piece of paper".[51]

Last, in declaring there was no need for an express right to vote as Singaporeans were now experienced in this democratic practice after more than 40 years of nationhood, the Minister focused on the 'educative' or 'symbolic' role of express rights, downplaying the protective function of rights as justiciable entitlements, limiting state power. It remains to be seen whether a case for an alleged violation of an implied right to vote may be litigated, with one chief difficulty being the absence of constitutional criteria stipulating the normative content of such right. If left to statutory regulation, there is little legal obstacle to stand in the way of preventing a strong Parliament from radically altering the voting system, subject to satisfying the 'reasonable classification' test that legitimates legislative differentiation while voiding legislative discrimination.[52]

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[48] See art. 5(2A), which is still not in force after almost 20 years. This covers a range of constitutional provisions, most notably relating to the elected presidency which the government is still refining. The government has stated it will not bring art. 5(2A) into partial effect ahead of the elected presidency provisions: Sing., *Parliamentary Debates*, vol. 82 ("Article 5(2A) of the Constitution (Operation of constitutional provisions)") (12 February 2007) (Professor S. Jayakumar).

[49] Naming Myanmar and North Korea as countries whose constitutions have express constitutional rights to vote (and by implication, which were not enjoyed in practice) and the U.K. as having no written constitution which did not mean political liberties were insufficiently protected: *Law Minister K. Shanmugam, supra* note 18.

[50] Thio, *Passage of a Generation*, *supra* note 20 at 45, 357. This is also reflected in Prime Minister ("PM") Lee Hsien Loong's declaration, in opposing an adjournment motion calling for amendments to by-election law, that: "I am here not to argue constitutional niceties with a constitutional expert like Thio Li-ann or legal refinements with so many other eminent legal minds in this House, but to set out the political realities of what works for Singapore and how Singapore has to operate in order that this Government will function well for Singaporeans.": Sing., *Parliamentary Debates*, vol. 84, col. 3328 ("Motion: Parliamentary Elections") (27 August 2008) (Mr. Lee Hsien Loong).

[51] *Law Minister K. Shanmugam supra* note 18.

[52] *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R. 410 at para. 59 (C.A.) [*Taw Cheng Kong* (C.A.)].

III. Constitutional Interpretation by Method of Implication

Those who interpret legal documents with finality have, in the face of the law-maker's inadvertence or omission, employed the device of implied terms to serve the interests of efficacy or to achieve justice.[53] A theory of adjudication is needed to identify the legitimate legal sources and interpretive methods a judge may apply, where government is based on the doctrine of separation of powers.

Behind every Constitution as founding document is a political or jurisprudential theory informing constitutional interpretation,[54] bearing in mind the open-textured quality of terms such as "law" or "equal protection" whose meanings are contested. If one subscribes to a theory of constitutional formalism, the written constitutional text is of "utmost importance" and should be "implemented as closely as possible to the intent of those who framed the constitution".[55] Conversely, constitutional pragmatism rejects the idea that a Constitution can be fully codified. It lays stress on "constitutional practice", institutional adaptation or modification and "the actual interpretation of the constitutional statutes, whether by the courts or by the participants in politics",[56] which can alter the meaning of constitutional provisions without formal textual amendment.

Thus, constitutional arguments may derive from the plain meaning of the constitutional text, from the historically identifiable 'original intent' of its framers, from constitutional theory, which relates to the purposes of the Constitution drawn from discrete provisions or the entire text, arguments from judicial precedent and lastly, value arguments constructed from free-standing socio-political values which the interpreter considers normatively desirable, without any textual or historical basis. The latter may be drawn from natural law, consensus, traditional morality, economic efficiency or value preference barely asserted.[57] Distinct but related issues pertain to how much weight to accord these types of arguments and jurisdictional question like whether judges or political branches are better suited to make value choices, particularly, controversial ones.

A. *Interpretation by Implication*

1. *Common law rights*

There have been suggestions in other commonwealth jurisdictions that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts

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53 In contract law, courts may imply a term "in fact" under the business efficacy test which only applies to a particular contract, or imply a term "in law" which applies to all future contracts of a particular type, to ensure fairness and justice which is grounded on reasons of public policy. See *Jet Holding Ltd. v. Cooper Cameron (Singapore) Pte. Ltd.* [2006] 3 S.L.R. 769 at paras. 89-91 (C.A.), *per* Andrew Phang J.A. See also Benedict Coxon, "Open to Interpretation: The Implication of Words into Statutes" (2009) 30(1) Stat. L. Rev. 1.

54 For a comparative overview, see Jeffery Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (New York: Oxford University Press, 2006).

55 Jan-Erik Lane, *Constitutions and Political Theory* (Manchester: Manchester University Press, 1996) at 13-14.

56 *Ibid.*

57 Fallon, *supra* note 10.

to have destroyed them".[58] This is to accord 'constitutional' status to common law rights and to treat the common law as fundamental law, a source of basic normative standards.[59] Nevertheless, a 'constitutional right' in the English context may still be curtailed by express legislative provision.[60] While the Singapore High Court has recognised the concept of common law residual liberties applies insofar as "a person is at liberty to do as he wishes except that which is prohibited by law or which encroaches upon the rights of others",[61] there has been no explicit recognition of common law rights with quasi-constitutional status.[62]

2. *Implying rights from judicial value preferences*

The finding of implied rights at common law is distinct from finding un-enumerated constitutional rights derived from judicial value choices, which creates difficulties such as whether such a right exists on a true interpretation of the constitution or is an illegitimate exercise of judicial power.

As was judicially noted, "even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute".[63] Exemplary of this is the due process jurisprudence associated with the American Fourteenth Amendment and its protection of "life, liberty or property". An apparently limitless reading of 'liberty' was evident in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[64] where the majority judgment declared constitutional protection of "personal decisions relating to marriage, procreation, contraception". A person had the right in making "the most intimate and personal choices… central to personal dignity and autonomy", such as whether to bear a child, to be free from unwarranted government intrusion. In a paean to individual autonomy and defining one's own concept of meaning, Justice Kennedy pompously declared: "At the heart

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58 Sir Robin Cooke in *Fraser, supra* note 8. Justice Cooke in *Taylor v. New Zealand Poultry Board* [1994] 1 N.Z.L.R. 394 at 398 stated it would be beyond Parliament to compel someone to confess, breaching the common law tradition of the right to silence.

59 See, *e.g.* Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 Oxford J. Legal Stud. 435. See *Dr. Bonham's Case* (1610) 8 Co. Rep. 114 (C.P.) where Sir Edward Coke held that legislation contrary to "common right and reason" must be declared void.

60 In *Reg. v. Lord Chancellor, Ex p. Witham* [1998] 1 Q.B. 575 at 581, 585-586 [*Ex p. Witham*], Laws J. described his understanding of a constitutional right as one to which the common law has given a special weight, such as a citizen's access to courts, unless the executive is permitted by the clear words of legislation to restrict this.

61 *Cheong Seok Leng, supra* note 15 at 579D.

62 However, Lee Sieu Kin J.C. suggested that Singapore should, following evolving English practice, recognise a common law tort of interference with privacy, as a method of preventing invasion of privacy by harassment: *Malcolmson Nicholas Hugh Bertram v. Naresh Kumar Mehta* [2001] 4 S.L.R. 454 (H.C.). Although the case concerned the offence of harassment under s. 13A and B of the *Miscellaneous Offences (Public Order and Nuisance) Act* (Cap. 184, 1997 Rev. Ed. Sing.), Justice Rajah in *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 S.L.R. 582 at para. 136 (H.C.) [*Chee Siok Chin*] noted "All persons have a general right to be protected from insults, abuse or harassment". Richard Magnus S.D.J. in *Public Prosecutor v. Koh Song Huat Benjamin* [2005] SGDC 272 at para. 8 noted: "The right of one person's freedom of expression must always be balanced by the right of another's freedom from offence". It is not certain whether these non-constitutional interests are derived from the common law or inferred from legislative provision.

63 Laws J. in *Ex p. Witham, supra* note 60 at 581.

64 (1992) 112 S.Ct. 2791.

of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life".[65]

What does the conception of radical autonomy contained in this "insipid New Age solipsism"[66] not cover? Does this über-autonomist conception reflect social reality and human relations? Does it not portend a debasement of the currency of "rights" insofar as any political claim can be couched as a right, to insulate it from political contestation?[67]

This "modern make-it-up-as-you-go-along judicial decision-making that hides behind the euphemism of the living Constitution"[68] is unlikely to gain traction in Singapore where judges do not descend into the political thicket and prefer to suggest legislative reform rather than engage in judicial legislation.[69]

3. *Australian experience: Implying freedoms from 'text and structure' as limits on legislative power*

The declaration of an implied political freedom of communication ("implied freedom") by the Australian High Court[70] is instructive in thinking through a sound constitutional basis for finding an implied constitutional right to vote in Singapore. Like the *Singapore Constitution*, the Australian one borrowed the fundamentals of representative, responsive government from the British Westminster system, with local modifications.[71]

In what might be described as a desire to advance rights discourse, the Australian High Court in three "core"[72] cases developed the doctrine of an implied freedom.[73]

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65 *Ibid*. at 2807.

66 Edward Whelan, "The Meta-Nonsense of *Lawrence*", online: (2006) Yale L.J. (The Pocket Part) 133 <http://www.thepocketpart.org/2006/06/whelan.html>.

67 As Hall argued in relation to human rights unhinged to a theory of human flourishing but based on subjective notions of autonomy, the category of rights becomes:

> a sanctuary into which may be placed whatever interests the politically powerful or astute wish to quarantine from normal contention…the language of human rights becomes too frequently little more than an illiberal rhetorical card which may be played for the purpose of pre-emptively silencing (or 'trumping') dissent. It becomes a means of unilaterally and arbitrarily restricting the scope of legitimate debate. Every important issue of public policy…thus tends sooner or later to become a question of human rights…

Stephen Hall, "The Persistent Spectre: Natural law, International Order and the Limits of Legal Positivism" (2001) 12 E.J.I.L. 269 at 304-05.

68 Whelan, *supra* note 66.

69 For example, the High Court in *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2009] 1 S.L.R. 177 at para. 226 (H.C.), stated that there was no general media privilege to political libel at common law and that Parliament rather than the courts should introduce this by amending the *Defamation Act* (Cap. 75, 1985 Rev. Ed. Sing.). In *Taw Cheng Kong* (C.A.)*, supra* note 52 at para. 88, the court suggested that Parliament adopt the effects doctrine as the basis of its extraterritorial laws dealing with corruption.

70 See H.P. Lee, "The Implied Freedom of Political Communication" in H.P. Lee & George Winterton, eds., *Australian Constitutional Landmarks* (Cambridge: Cambridge University Press, 2006) 383.

71 For example, judicial review in Singapore includes both review of administrative action and legislation. In the Australian context, the idea of federalism borrows from U.S. constitutionalism.

72 Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law" (2006) 13(1) Ind. J. Global Legal Stud. 37 at 45.

73 *Australian Capital Television Proprietary Ltd. v. Commonwealth* [1992] 177 C.L.R. 106 [*Australian Capital Television*]; *Theophanus v. Herald & Weekly Times Ltd.* [1994] 182 C.L.R. 104 (the implications of the implied freedom for common law defamation law and qualified privilege in relation to how an MP

The case of *Australian Capital Television* was concerned with Commonwealth legislation prohibiting paid political advertisements in the period before elections, impeding informational flows about the candidates and their policies. The reasoning proceeded thus: the Constitution established the Commonwealth as a "representative democracy", a system of "ultimate control by the people, exercised by representatives who are elected periodically".[74] From this, an implied freedom of political communication was derived, being considered "indispensable"[75] to the effective operation of representative government. This implied freedom warranted protection from undue restriction, constituting a limit on federal legislative power.

This line of reasoning opened the door to deriving other implied freedoms as guarantees needed to effectuate "representative democracy", and similar arguments have been raised to advance the idea that the Australian Constitution also contains an implied right to vote.[76]

In *Lange*[77] the implied freedom was induced from the 'text and structure' of Constitution, though in other cases, it appears to have been treated as being derived from a free-standing principle.[78] Unlike due process rights, the right to vote is not a "deep" common law right superior to statutory enactment.[79]

These decisions reflect a changing perception of the Australian Constitution not as Imperial Statute but as a social contract, embodying popular sovereignty. The finding of an implied freedom to political communication was expressly linked to an overarching notion of what Deane and Toohey JJ. described as "the doctrine of representative government" in *Nationwide News*.[80] Borrowing from social contractarian theory, the "rational basis" of said doctrine "is the thesis that all powers of government ultimately belong to, and are derived from, the governed". The intent of the "constitutional imperatives" of responsible government is to make both the legislature and executive branches of government popularly accountable.[81] Free speech serves representative democracy as it relates to the freedom to speak about political matters, to enable voters to make informed decisions.[82] The constitutionally

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discharged his public duties); *Lange v. Australian Broadcasting Corporation* [1997] 189 C.L.R. 520 at 569 [*Lange*] (reaffirming an implied freedom protection communication on 'political and government matters' and the extension of qualified privilege defence to publisher in case of political libel under New South Wales statute, to ensure common law was consistent with the Constitution provided the publication was reasonable in the circumstances). See also *Nationwide News Pty. Ltd. v. Wills* [1992] 177 C.L.R. 1 [*Nationwide News*].

74 *McGinty v. Western Australia* [1996] 186 C.L.R. 140 at 285 [*McGinty*]; see also at 284, 272.

75 *Lange, supra* note 73 at 559.

76 Anthony Gray, "The Guaranteed Right to Vote in Australia", online: (2007) 7:2 QUT Law & Justice Journal 178 <http://austlii.law.uts.edu.au/au/journals/QUTLJJ/2007/12.html>. (analysing *Roach v. Electoral Commissioner* [2007] HCA 43 and drawing out the significance of the implied freedom of political communication cases and how this might impact broader rights of political participation). Notably, Toohey J. in *McGinty, supra* note 74 at 203 was prepared to deduce from the principle of representative democracy a broad requirement of equal value of votes.

77 *Supra* note 73 at 556–557.

78 *McGinty, supra* note 74 at 234, 251 (McHugh J.).

79 Brennan, C.J., "Courts, democracy and the law" (1991) 65 Austl. L.J. 32 envisages such rights as presumptions against the retrospective creation of criminal offences or the expropriation of property, rather than political rights.

80 *Supra* note 73 at 70.

81 Brennan J., *ibid.* at 47.

82 McHugh J. made this connection expressly: "Before (the electors) can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an

entrenched principle of representative democracy "carries with it those legal incidents which are essential to the effective maintenance of that form of government".[83]

As Saunders notes, Australia has "a written but thin Constitution which structures power but confers no right".[84] Unlike the free-standing First Amendment free speech right, the implied freedom of political communication is cast in the frame of a limitation on power.[85] Apart from being deduced from the principle of representative democracy as an implicit assumption of sorts taken for granted by the constitutional framers, or otherwise derived from the Constitution's 'text and structure', no detailed guidance is provided as to its content or limits.[86]

B. *How to Argue for the Judicial Recognition of the Constitutional Right to Vote in Singapore*

Despite the Law Minister's unequivocal statement, on the advice of the Attorney-General, that the right to vote is an implied constitutional right, the courts are the final arbiter on questions of constitutionality under the Singapore model of separation of powers. As this issue is unlikely to form the basis of a particular dispute, it would, absent an express constitutional amendment, be desirable to ask the constitutional tribunal provided for under article 100 to give its authoritative opinion.[87]

What constitute the strongest bases for securing the judicial recognition of the constitutional right to vote, which is both analytically defensible and normatively justified? Does Singapore law or precedent support an interpretive method needed to locate an implied fundamental right? What are the relevant guiding factors, which are needed to restrain judicial discretion?

As a matter of interpretive approach, section 9A of the *Interpretation Act* allows for a purposive interpretation of written law to "promote the purpose or object underlying the written law". Section 9A(3)(c) and (d) identifies ministerial speeches made at the second reading of Bills or "any relevant material in any official record of debates in Parliament" as appropriate aspects of the interpretive matrix. Even where interpreting the Constitution, a purposive approach is advocated to give effect to Parliament's intent and will.[88] However, these stipulations apply to written or express law and do

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informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation". *Australian Capital Television, supra* note 73 at 231.

83 *Nationwide News, supra* note 73 at para. 19.

84 Saunders, *supra* note 72 at 60.

85 *Lange, supra* note 73 at 560, 563.

86 For a discussion on factors in deriving implications, see Jeremy Kirk, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples" (2000) Melbourne U.L. Rev. 26, online: <http://www.austlii.edu.au/au/journals/MULR/2000/26.html>.

87 Art. 100 provides that: "The President may refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise". This is to be read subject to art. 21(1), "on the advice of the Cabinet". The President has no power of initiative. This clause has only been invoked once in relation to the scope of presidential powers: *Constitutional Reference No. 1 of 1995* [1995] 2 S.L.R. 201 (Constitutional Tribunal) [*Constitutional Reference No. 1*]. Nominated MP Professor Thio Li-ann had suggested putting the question to the advisory tribunal "in the interests of clarity": *supra* note 42.

88 *Constitutional Reference No 1, ibid.*

not contemplate the finding of implied constitutional rights, let alone their content, which is necessary to ascertain instances of violation.

There are various possible bases on which to ground an implied constitutional right to vote, either discretely or cumulatively. The weakest base is to frame it as a free-standing right simpliciter derived from appeal to a normatively desirable political philosophy said to inform the constitutional ethos such as popular sovereignty[89] or the doctrine of 'representative democracy', whose content and form is unspecified. Such doctrines have an external existence independent of the Constitution, drawn from law, politics and economics and are incorporated into the Constitution by means of judicial reference.

There is no doubt that a court convened to hear a constitutional question will give serious weight to the Law Minister's pronouncements, as to agree with it affirms rather than challenges executive or legislative power. At the very least, the Law Minister appreciated the instrumental importance of voting rights to the functioning of a representative democracy.

A stronger base could be built on historical understandings, contemporary practice and derivation from the 'text and structure' of the Constitution. It is also worth noting that in terms of judicial interpretive approaches, the record is mixed. There have been clear judicial rejection of implied basic features[90] as well as bare declarations of paramount constitutional mandates sans textual basis.[91]

1. *History and contemporary practice*

In terms of the history of constitutional origins, a mild form of 'originalism'[92] might be useful in arguing that the framers worked with certain assumptions which they did not make explicit, as is the drafting style associated with Westminster constitution drafters. This is an appeal to imputed intention or traditional understandings of the meaning of a legal term, derived from a drafting style rather than a drafted text. Here, the meaning of the Constitution is guided by the intended meaning of its makers, by reference to extraneous materials revealing the intent of these framers. This is distinct from a non-originalist 'living tree' view of the constitution whose meaning shifts with the changing needs of society as judicially determined.

For example, the Privy Council in *Ong Ah Chuan v. Public Prosecutor*[93] eschewed a literalist approach in finding that references to "law" in Westminster based constitutions:

> 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. Failure to

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89 There has been no judicial discussion of popular sovereignty; where sovereignty has been invoked, this has been in relation to treating it as a synonym for state integrity (*Colin Chan, supra* note 16 at 684) or an attribute of statehood in Singapore's dealings with foreign states: *Public Prosecutor v. Salwant Singh s/o Amer Singh* [2004] SGDC 146 at para. 35.

90 *Teo Soh Lung v. Minister of Home Affairs* [1990] 2 M.L.J. 129 (Sing. C.A.).

91 *Colin Chan, supra* note 16 at 684F-G.

92 A method of interpretation that focuses on the intent of the constitution-maker.

93 *Ong Ah Chuan, supra* note 13.

> recognise this 'given' would make the purported constitutional entrenchment of various liberties 'little more than a mockery'.[94]

This refers to a shared understanding of legal concepts.

In *Liyanage*[95] historical continuity was one of the reasons cited, in the face of the silence of the Ceylonese Constitution, to affirm that judicial power was exclusively vested in the courts, absence of express provisions notwithstanding.[96]

So too the Privy Council majority judgment in *Hinds*[97] reiterated the view that new constitutions were drafted for peoples "already living under a system of public law in which the local institutions through which government was carried on…reflected the same basic concept".[98] As Westminster constitutions "were evolutionary not revolutionary, these provided for continuity of government by successor institutions similar to those they replaced".[99]

It was because of this that "a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions".[100] Thus, as "a rule of construction applicable to constitutional instruments" adopting the Westminster system, the "absence of express words" does not prevent the judicial powers of the new state being exclusively exercised by the judicature.[101]

Lord Diplock distinguished between judicial reasoning dependent on express constitutional terms and reasoning "which depended on what, though not expressed, is none the less a necessary implication from the subject mater and structure of the Constitution and the circumstances in which it had been made".[102] He noted that drafters of Westminster constitutions were "nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom".[103] Thus, their understandings of the separation of powers informed the constitutional question of whether judicial power could be exercised by the political branches. It was something that could be taken as continuing to apply in the Jamaican context.[104]

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94 *Ong Ah Chuan v. Public Prosecutor* [1980-1981] S.L.R. 48 at 62A-B (P.C.). See also the reference to "fundamental rights and principles recognised by the common law at the time the Constitution was adopted". *Nationwide News, supra* note 73 at 69.

95 The case related to the passage of *ad hominem* legislation, directed against certain arrested terrorists and having the effect of ensuring that "the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences". *Liyanage, supra* note 6 at 696D.

96 "[The] constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than century, in the hands of the judicature". *Ibid.* at 693G.

97 *Supra* note 1.

98 *Ibid.* at 212A-B, *per* Lord Diplock.

99 *Ibid*. at 212C.

100 *Ibid.* at 212D-E.

101 *Ibid*. at 212D-F.

102 *Ibid.* at 211E-G.

103 *Ibid.* at 212A-B.

104 The minority judges (Viscount Dilhorne and Lord Fraser) dissented against the view that a great deal was left to implication where a written constitution was adopted: *Ibid*. at 237E-G:

As far as construing an implied constitutional right to vote, in the absence of records on debates concerning the drafting of the constitution, any intent to be inferred must be gleaned from extraneous materials. For example, it is significant that the 1966 Constitutional Commission recommended the inclusion of a new constitutional right to vote and that this should be "entrenched… in the same manner as the other fundamental rights" as recommended, that is, an amendment procedure requiring two-thirds of the people's vote at a national referendum.[105] However, the reasons for not adopting this constitutional right to vote are not apparent from a study of the parliamentary records when the Commission's report was debated. Nonetheless, we may infer from the general statements of the report a continuing commitment to a representative democracy as the basis for government.[106]

In addition, contemporary practice since Independence shows an endorsement of representative democracy insofar as "We have had 10 general elections since then with about 95% turnout at each election. Every citizen reaffirms that Singapore is a democratic society every time he or she recites the pledge".[107] There have been repeated ministerial affirmations of "representative democracy" and even distinctions between different models of implementing it.[108] Thus, it could be reasonably argued that "representative democracy" is the endorsed political ideology informing the Singapore system of parliamentary government.

2. *Text and structure*

Shored by a normative historical and contemporary commitment to parliamentary democracy, which voting effectuates, it may be argued that an implied right to vote is derived from the existing constitutional structure and a purposive reading of articles 65 (parliamentary dissolution) and 66 (holding of general elections within a certain time period). A constitutional right to vote in this reading must be "logically or

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A written constitution must be construed like any other written document in order to "give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the constitution itself and not from any preconceived ideas as to what such a constitution should or should not contain".

Indeed, given how constitutions differed from ordinary legislation, this should "lead to even greater reluctance to imply something not expressed". Otherwise, "a written constitution would largely fail to achieve its object".

105 *Wee Report, supra* note 20 at paras. 43, 78, 81.

106 The Report refers to the "practice of parliamentary democracy" (para. 47), discusses how to best secure "the continued practice of a sound democratic system of government in Singapore" (para. 54), the people's "faith in a democratic system of government" (paras. 74-75), the survivability of "the system of parliamentary democracy based upon representative government" (para. 76). It even suggests non-elected bodies which might be able to play the role of opposition when "there is no responsible or effective Opposition in Parliament" (para. 16).

107 *Law Minister K. Shanmugam, supra* note 18.

108 Notably, the PM distinguished the model of "choosing candidates to become MPs as the fundamental element of the whole" from the Singapore approach of realising parliamentary democracy, which places "the emphasis on choosing political parties to form the government and to have political parties as the fundamental element in the system".: *supra* note 50.

practically necessary for the preservation of the integrity of that structure",[109] as constitutionally established. This limits possible implications.

The Law Minister adopted a multi-provisional approach in citing 2 provisions, to support this form of structural implication; although the constitutional text is not abandoned or displaced by the wholesale importing of a political philosophy, this approach does not accord primacy to the text as the actual words of these provisions play almost no role in filling in the meaning and scope of the constitutional implication. Nonetheless, they do cumulatively communicate a broader purpose to serve as the focal point from whence to induce 'representative government' as a political ideology or external general doctrine of government which is then constitutionally incorporated. This then serves as the source of the implied right. Notably, neither article 65 nor 66 create justiciable individual rights and are more akin to positive state obligations to create a democratic system, essential to vindicating political participation rights.[110]

The nature of this system is also fleshed out in articles 25 and 26, which govern the appointment of the Prime Minister and his cabinet, requiring that the former "command the confidence of the majority of the Members of Parliament". The democratic constitution of Parliament accords it a stronger claim to legitimacy, than the executive or judiciary, in making rules. Indeed, this respect for democratic legitimacy is reflected in the judicial restraint evident in according a "generous and not a pedantic interpretation" to parliamentary intent where evaluating the justifiability of restrictions on constitutional rights in the interests of stipulated public goods.[111] In this respect, the implication can be justified as necessary to protect a foundational constitutional principle. As the Constitution provides for general elections, it is reasonable that the conditions necessary to effectively protect this process should be constitutionally safeguarded.

This principled exposition of the constitutional basis for the right to vote does not open the door to a 'free for all' finding of all kinds of un-enumerated rights, which may insulate contentious subjective political claims cast as 'fundamental rights' from public debate. It is rooted in the historical understanding of the Westminster constitution's embodiment of representative democracy, as well as the continuing endorsement of this political doctrine as a basis for shaping the legal order; this is closely affiliated with the need to ensure sufficiently muscular rights, institutions and processes for protecting its values.

In conclusion, a trajectory worth exploring is whether other implied fundamental rights may be derived, drawn from history, the constitutional text or structure. A primary candidate might be the right to a judicial remedy for alleged rights violations, derived from article 93 which vests judicial power exclusively in the Supreme Court. That the courts have claimed the power to strike down legislation on grounds of unconstitutionality provides a basis from practice for implying such a right, the practical effect of which might nullify judicial ouster clauses over rights cases. The Law Minister refused to speak to whether further implied right existed in the absence

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[109] *Australian Capital Television*, *supra* note 73 at 135, *per* Mason C.J.

[110] See Thio Li-ann, "The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian' Democracy" (2002) 6 Sing. J.I.C.L. 181 [Thio, *Right to Political Participation*].

[111] *Chee Siok Chin, supra* note 62 at 603.

of a specific question, but did affirm that constitutional provisions could be implied "depending on the structure and the context of the various provisions".[112] It remains to be seen whether invoking implied rights will become part of public law litigation strategy.

IV. The Importance of Being Explicit

A. *Safeguarding Voting: The Existence of a Right and its Content*

The rationale for safeguarding representative democracy as a foundational constitutional pillar from which structure the right to vote is derived is not difficult to grasp:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government…undoubtedly the right of suffrage is a fundamental matter in a free and democratic society… as long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[113]

The importance of the right to vote is reflected in its embodiment in international human rights instruments[114] and its various constitutional instantiations.[115] The Law Minister underscored that articles 65 and 66, from where the right to vote is derived, will be subject to the most onerous amendment procedure at a later date and be more tightly entrenched than other constitutional clauses.[116] This underscores the importance of constitutional rights as fundamental liberties, "not stick and carrot privileges",[117] flowing from their status as part of a higher legal order foundation.

The Law Minister apparently referred to a version of popular sovereignty in denying that voting could be a privilege as this "would imply that there is some institution superior to the body of citizens which is in a position to grant such a privilege to the citizens. But in a free country, there is no institution that can be in such a position to grant such a privilege to the citizens".[118] This Lockean idea of the social contract and

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[112] *Law Minister K. Shanmugam, supra* note 18.

[113] *Reynolds v. Sims*, 377 U.S. 533 at 556, 562-563 (1964), *per* Warren C.J.

[114] Art. 21(1) of the *Universal Declaration of Human Rights*, GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/180 (1948) 71 [*UDHR*] declares: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". See also art. 25 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [*ICCPR*]. Notably the 2007 Charter of the Association for South-East Asian nations affirms the principle of democracy without specifying its contents: arts. 1(4), 1(7), 2(2)(h). Text of the ASEAN Charter available online: <http://www.aseansec.org/21069.pdf>.

[115] S. 47, Constitution of Timor-Leste (2002); art. 36, Constitution of Romania (1991); c. 2, s. 19, Constitution of South Africa (1997); art. 54, Constitution of the Socialist Republic of Vietnam (2001).

[116] This turns on when the government will bring art. 5(2A) into operation. When it does, Parliament shall not pass a bill to amend arts. 65 and 66, inter alia, unless it has the support of two-thirds of the electorate at a national referendum, unless the President otherwise specifies.

[117] *Taw Cheng Kong* (H.C.), *supra* note 19 at para. 56, *per* Karthigesu J.A.

[118] *Law Minister K. Shanmugam*, *supra* note 18.

government by consent of the governed is reflected in article 21(3) of the *Universal Declaration on Human Rights*.[119]

Without a right to vote as a method of choosing one's governors, it is hard to see how popular sovereignty can be vindicated. John Stuart Mill, a leading advocate of representative government, considered the best form of government was one where the "the sovereignty or supreme controlling power in the last resort is vested in the entire aggregate of the community". Representative government is a system where "the whole people or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which in every constitution must reside somewhere".[120] This is particularly important given that democratic elections are key to safeguarding political rights and democratic values.[121]

While the rationale for representative democracy is broadly couched in philosophical terms, and while the constitutional status of the right to vote seems secure, its content is not constitutionally stipulated. This could include criteria for what might constitute a 'free' and 'fair' electoral system. Nor does it appear that the implied constitutional right to vote is of the same genre as Part IV fundamental liberties which are justiciable entitlements, as opposed to limits on legislative power.[122] The terms of voting are regulated by the *PEA* statutory regime,[123] breaches of which trigger the conditions for filing an election petition.[124]

Theoretically, the Cabinet, which controls 82 of 84 elective parliamentary seats, can direct that Parliament enact laws which provide certain citizens with double votes and immunise this from constitutional challenge by a notwithstanding clause.[125] Without constitutionally mandated requirements, the electoral system could be too easily moulded into a form which is neither free, fair nor secret, nor would votes have to possess equal values. Article 66 itself only provides a time period within

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[119] "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". *UDHR, supra* note 114.

[120] John Stuart Mill, *Representative Government* 1861 (Kitchener: Batoche Books, 2001) at 37, full text available online: <http://www.efm.bris.ac.uk/het/mill/repgovt.pdf>.

[121] Para. 21 of the *Maintenance of Religious Harmony White Paper*, Cmd. 21 of 1989 states:

> If political leaders become corrupt or the government of the day acts contrary to the interests of the people, the remedy must be sought through checks and balances in the political system, for example by public meetings, publicity in the media, debates and motions of no confidence in Parliament, actions in the Courts and finally by campaigning to oust such a government in a general election.

[122] See generally Li-ann Thio, "Protecting Rights" in Li-ann Thio & Kevin Y.L. Tan eds., *Evolution of a Revolution: 40 years of the Singapore Constitution* (Abingdon: Routledge-Cavendish, 2009) 193 at 201-205.

[123] *Supra* note 17.

[124] In 1997, Attorney-General opined that s. 82(1)(d) of the *PEA* was not breached by the presence of high-ranking People's Action Party members within the polling station, as this only applied to prohibited personnel outside the station who might exert undue influence or harassment. This was read out before Parliament in response to allegations by opposition MPs that the *PEA* had been breached: Sing., *Parliamentary Debates*, vol. 67, col. 1338 at 1340–1344 (30 July 1997). The Attorney-General's written opinion is available at cols. 1417–1424. In the Malaysian context, see *Wan Sagar bin Wan Embong v. Harun bin Taib & Ors* [2008] 4 M.L.J. 585 where an election petition was brought alleging general intimidation on election day.

[125] See art. 39A(3) which immunises the Group Representation Constituency ("GRC") system from constitutional challenge on grounds of infringing the art. 12 equal protection guarantee.

which general elections must be held, saying nothing about the quality of the electoral system, which is left to statutory regulation.

Why then, write rights expressly in the supreme law of the land? Firstly, because it is important not only to have a constitutional right to vote but an effective right to vote. This can be more strongly secured by constitutional specification of the nature of the vote. Otherwise, the legislature is free to stipulate less than optimal conditions without legal constraint or challenge. Inferring an implied right to vote from various constitutional provisions does not indicate what the Constitution requires, prohibits or authorises in order for a voting system to fully realise representative democracy. Constitutionalising the conditions for an effective right to vote would insulate these conditions, such as voting "at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors",[126] from being altered to suit the vagaries of ordinary politics. It would place the basic rules of the game beyond the reach of simple majorities. Stipulating these conditions would also play an important educative function to the public.

The Law Minister argued that not having an express right to vote was not unique and "has not hampered us in any way", given the experience of being "one of the few post-colonial countries to hold regular elections" with high voter turnout, it being a legal requirement to vote. He doubted whether countries, like the Philippines and Thailand, whose constitutions "set out democratic rights in greater detail than Singapore does" meant that rights in Singapore are "less well-protected". He located the ultimate guarantee of representative democracy in "the kind of institutions you have and the kind of people you have".[127] He was content to leave the facilitation of the implied constitutional right to vote to statutory prescriptions, which would include the identification of right-holders, disqualification criteria, and what it takes to ensure free and informed elections, without intimidation. What was fundamental in his view was the government's commitment to "the rule of law, an educated population aware of its rights and responsibilities and stable institutions which provide for a democratic politic".

Without constitutional criteria stipulating the conditions for constructing an effective right to vote, the judiciary would be handicapped in interpreting this implied right, its scope and limits, beyond statutory prescription, if the occasion ever arose.[128] Given the conservative judicial approach towards reading constitutions and the deference to Parliament in this respect, it is unlikely that the judiciary would appeal to normative ideals relating to some vision of 'representative democracy' which lacks a positive law mooring. For example, if there is a constitutional right to equal voting values, this might call into question the constitutionality of the current electoral system, based on a minority of single member wards and Group Representation Constituencies ("GRCs"), as the latter privileges minority voters and constricts voter choice by requiring consent to a team rather than individual candidate.[129]

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[126] Art. 25(b) of *ICCPR, supra* note 114.

[127] *Law Minister K. Shanmugam, supra* note 18. This discounts complaints, *e.g.*, about gerry-mandering and the lack of transparency in the ward delimitation process: see Thio, *Right to Political Participation*, *supra* note 110 at 211-214.

[128] See generally William J. Brennan Jr., "Why have a Bill of Rights"' (1989) 9(4) O.J.L.S. 425.

[129] The quota for minority representatives could be explained as a realisation of the government's art. 152 obligation to care for the interests of racial and religious minorities. Further, the possibility that the

One could infer that Parliament or, more accurately, the parliamentary executive, prefers to retain discretion on how to shape the statutory regime facilitating voting. This is very much a British or Diceyan faith in Parliament being the best institution to protect rights, even in the Singapore context where judicial power extends to striking down unconstitutional laws. Thus, the implied constitutional right to vote may be likened in effect to article 152, which imposes an obligation on the government to care for the racial and religious minorities, without stipulating how nor creating a process to challenge violations of this state duty. So too, the government must by law establish a voting system, but can shape this without need to conform to specific norms.

V. The Nature of Representative Democracy in Singapore: A Few Reflections

Voting rights operate within the context of democratic political orders which may vary across jurisdiction in terms of character and quality, although voting rights must qualify as a core aspect of a democratic system as the mechanism for determining the popular choice of governors. Within the Singapore context, the continuing internal People's Action Party ("PAP") review to ensure "getting our politics right" to ensure growth and to avoid "unstable politics" through ensuring "systematic political succession"[130] has also received external stimulus through motions debating the need to amend laws on by-elections and parliamentary questions and debates on the status of voting rights.

This section reflects on the state of representative democracy in Singapore some 50 years after self-government, and on the deliberate crafting by the ruling government to evolve the democratic institutions to ensure "a wider range of views in Parliament…and strengthen the role of Parliament as the key democratic institution where important national issues are deliberated and decided", without "inadvertently" producing weak governments to "placate those who desire a strong opposition in Parliament".[131]

A. *Models of Representative Democracy*

The Law Minister declared that: "Representative Democracy is the very essence of our political system; and voting is the foundation of Representative Democracy".[132] As the Prime Minister noted in another context, representative democracy "is a buzzword" whose particularist meaning and workings in Singapore was one that emerged "by deliberate design", to adapt to local circumstances in the face of experience.[133]

GRC scheme might contravene art. 12 of the *Singapore Constitution* is reflected in the inclusion of the 'notwithstanding' clause in art. 39A(3), immunising the scheme from constitutional challenge.

130 PM Lee's speech in debating the President's Address: Sing., *Parliamentary Debates*, vol. 86 ("Debate on President's Address") (27 May 2009) (Mr. Lee Hsien Loong).

131 *Ibid*.

132 *Law Minister K. Shanmugam*, *supra* note 18.

133 *PM Lee Hsien Loong*, *supra* note 50. Education Minister Ng Eng Hen also questioned whether it was self-evident that prescriptions concerning 'conventional practices of democracy' such as multiple political parties and newspapers would promote democracy, noting that politics and factionalism

This focuses on ground realities, reflective of a strain of performance legitimacy endemic in mainstream political discourse.

Is there then a minimum core to the concept of representative democracy? Patmore has identified three different models in this respect.[134] First, the 'protective theory' emphasises the need to hold political rulers accountable to the people through regular elections and other constitutional checks and balances. Free speech and other associated political liberties are crucial to informed voting and public debate. Second, the 'elite theory' of 'rule by politicians' views elections primarily as the vehicle for choosing governors; while the people have a role in ensuring the smooth circulation of elites, they play no part in governing. Third, the 'participation theory' focuses on the maximum participation of all citizens in the political decision-making process, necessary as a means of their development as individuals and as members of a polity.

This Singapore model is one which has created two categories of non-elective parliamentarians to represent the 'opposition' and alternative non-partisan perspectives in the House.[135] It accords special treatment to Malays as an indigenous minority, as recognised by article 152, which translates into guaranteed minority legislative representation under article 39A which requires that GRCs, which yield 75 out of 84 elective parliamentary seats, be contested by teams of 4-6 persons, one of whom must be a member of a stipulated minority group.[136] While Singapore's political system finds its origins in "the British model of parliamentary democracy",[137] its democratic institutions have evolved significantly and remain, like Singapore, a "work in progress".[138] The search has been to devise methods to enhance participation and "encourage a wider range of views in Parliament, including opposition and non-government" ones, while preserving political stability, which equates to the maintenance of a dominant party system.[139] This has chiefly been secured by the operation of the GRC system, where opposition parties have yet to win a 'team MP' constituency since its inception in 1988.[140] This is perhaps largely due to the PAP

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can paralyse decision-making, and that "Singapore has progressed because we did not seek to be like others, but chose our own paths". Dr. Ng Eng Hen, Speech in Parliament, 19 August 2009 available online: <http://www.moe.gov.sg/media/speeches/2009/08/19/speech-by-dr-ng-eng-hen-in-par.php> [*Dr. Ng Eng Hen*].

134 For further discussion on these different models, refer to Glenn Patmore, "Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia"' (1998) 7 Griffith L.R. 97.

135 For further developments, including extending the size of non-constituency MPs to be appointed per term and making permanent the institution of the Nominated MP, as well as make minor downsizes to the GRC team sizes, see PM Lee's speech in debating the President's Address: *supra* note 130.

136 Minister Mentor Lee recently declared the assumption of equal treatment for all races "false and flawed", noting that racial equality in Singapore "is going to take decades, if not centuries".: "MM rebuts NMP's notion of race equality" *The Straits Times* (Singapore) (20 August 2009).

137 *PM Lee Hsien Loong, supra* note 130.

138 *Ibid*.

139 Nor should we create a system which inadvertently produces weak governments, just to placate those who desire a stronger opposition in Parliament… We cannot afford a government that is ineffective, indecisive, or paralysed by internal divisions… We are not looking for a system which sounds good in theory, but is unsuited to our conditions and unworkable in practice.

Ibid.

140 The Prime Minister acknowledged that if GRC teams were too large, as many critics have argued, "it becomes harder for voters to identify with the whole GRC, or indeed, for MPs to get to know voters in wards they do not look after".: *ibid.*

strategy of fielding 'anchor' MPs in every team who will staff the team of cabinet ministers and under whose expansive wings fledging politicians may nestle and find succour, until they find their own political legs. Indeed, Senior Minister Goh Chok Tong candidly described GRCs as a useful vehicle for PAP self-renewal, by virtually guaranteeing first-timers with ministerial calibre a parliamentary seat.[141] The Singapore system is no longer oriented towards the individual parliamentarian but to party political systems, reflected in the fact than 75 of the 84 elective seats come from GRC wards[142] and the anti-hopping provisions which ties an MP to his party.[143]

Participation as a democratic value is encouraged,[144] while accountability, in the form of losing real political power at the ballot box, democracy's 'exit strategy', is underplayed. Weak coalition governments are anathema, in this political world-view.[145] Thus, the elite and the participation theory best describe the Singapore context.

B. *Voting and Citizenship: Liberal and Communitarian Visions*

There is a close linkage between the right to vote, democratic legitimacy and the conception of citizenship extant in any society as political association. To vote is to engage in the collective decision-making process as a right-holder and duty-bearer; it connotes full membership in a political community, if not affective loyalty to a nation. It is designed to serve a socially integrative function.[146] Voting also grounds political legitimacy, insofar as Parliament is recognised as the legitimate law-making body based on a theory of representation where a vote represents 'consent' to be governed, consonant with ahistorical social contract theories.

As a marker of identity, citizenship connotes a boundary line which marks off those who are included from those who are excluded in domestic politics.[147] Migrant

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141 Senior Minister Goh Chok Tong, South East CDC Members Appointment Ceremony (26 June 2006), available online: <http://www.cdc.org.sg>. See also Sing., *Parliamentary Debates*, vol. 66, col. 755 at 757 ("Constitution of Singapore (Amendment) Bill") (28 October 1996) (Mr. Goh Chok Tong).

142 GRC wards have only ever been contested by political parties since 1988 though conceivably, a group of politically unaligned independents could contest one.

143 Art. 46 of the *Singapore Constitution*, *supra* note 3.

144 For example, the intent to include a civil society representative as a Nominated MP was described as giving civil society "a voice in Parliament and encourage civil society to grow and mature further". The expanded role of non-elective MPs was to promote robust debate on national issues and to "keep Parliament in sync with the concerns and aspirations of Singaporeans": *PM Lee Hsien Loong, supra* note 130.

145 Discounting proportional representation systems which produce weak coalition governments: *ibid*.

146 Insofar as the GRC system by guaranteeing a minimum number of minority legislative representatives seeks to ensure the inclusion of ethnic minorities in mainstream society and to ensure their greater presence in government (as opposed to seeking forms of separate self government), this will strengthen the bonds with the larger community as is integrative in effect.

147 "…we will not allow foreigners to interfere in our domestic politics". While foreigners can share their views on accessible sites like the Internet, they were not citizens who alone could "take part directly in the politics of Singapore" as only Singaporeans had "the sovereign right to determine what kind of society they want Singapore to be".: Sing., *Parliamentary Debates*, vol. 84 ("Budget Head P—Ministry of Home Affairs (Paper Cmd. 2 of 2008)") (28 February 2008) (Mr. Wong Kan Seng).

workers and foreigners are excluded, but provision has been made to include Singaporeans overseas.[148] Democracy and citizenship are theoretically supposed to promote solidarity in a society which is plural, both in the sense of racial and religious differentiation, as well as viewpoint diversity.

As citizenship connotes an equal legal status, it also relates to a commitment to democratic decision-making procedures which includes consenting to an adverse outcome, in the hopes of changing it another day. This promotes political stability and manages dissent, and is particularly important with respect to matters of profound moral disagreement, where there is no Rawlsian overlapping consensus in the face of polarised stances, which every mature democracy faces. In the absence of substantive common ground, democracy as 'procedure' is not a means for resolving moral disagreements but for coming to a decision in the face of intractable disagreement.

In this respect, there are competing conceptions of 'citizenship' flowing from specific political theories about the citizen-state bond, which implicates how we view the function of a vote in society and the nature of politics we practice and seek to cultivate.[149]

Furthermore, a concept of citizenship which requires active public participation views this as promoting self-development by opening a citizen's mind, in the process of political debate, to the public interest rather than his own narrow agenda. This may conduce to promoting solidarity, not based on ethnicity or religious affiliation, but a commitment to political ideals. Broadly speaking, these relate to the dueling paradigms of the liberal and communitarian visions of state and society which propound different concepts of the self, the value of political participation and the common good.

From the perspective of the 'liberal' school, flowing about Enlightenment assumptions of the 'rational', atomistic individual, political participation is viewed not as a civic virtue in itself; it is the vehicle by which individual choice may be expressed, where the vote is the means for the individual to pursue his pre-existing interests in the electoral arena. In this view, it is not the task of the Constitution to inculcate active citizenship, even if the consideration of all viewpoints might provide the foundation for 'civic friendship'[150] or a sense of political community. The liberal approach advocates that the state demonstrate 'neutrality' and tolerance between competing views of the good life. Politics is then about advancing single issue agendas, more adversarialism and fragmentation, making it more difficult to build consensus on the common good.

Conversely, the communitarian view rejects as false the vision of the atomistic individual as individuals are embedded or situation in a community, the social context from whence they derive meaning. Communitarianism advocates a 'thicker' political community in correctly not valuing 'choice' or apparent neutrality as the ultimate ordering principle. Indeed, why should neutrality, rather than taking a stand on a matter, be viewed as a superior value? Instead, the state should *not* be neutral but should encourage the joint pursuit of a shared common good, informed by a broader

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148 "In 2001, we provided for overseas voting because more and more Singaporeans are now scattered on all the continents of the world.": *PM Lee Hsien Loong*, *supra* note 130.

149 See generally, Heather Lardy, "Citizenship and the Right to Vote" (1997) 17(1) O.J.L.S. 75.

150 John Rawls, *Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971) at 227.

moral or ethical code. As Sunstein notes, the door is open to the possibility of settling some normative disputes with substantively right answers.[151]

In the communitarian conception, an individual does not come to the public arena with fully formed views; rather, his views develop and are clarified through socio-political interaction through dialogue and debate where all are exposed to the complexity and variety of different views, which inform the revision of views in the interests of the larger common good. Politics is not viewed as the strategic advancement of one's own narrow agenda but as a form of civic-minded public deliberation that requires "civic virtue"[152] and a commitment to the process of elaborating the common good.

In this conception, political participation is viewed as necessary, not peripheral to personal development. It is not instrumental but serves the common good by promoting the civic virtues associated with deliberative politics, such as empathy and a sense of community feeling. Individuals have a role in creating community and are constituted by community insofar as this context provides meaning to their choices.

Singapore practice is more aptly captured by a 'communitarian' vision of citizenship, as an ideal.[153] Here, the official stance is to value consensus over contention:

> Resolving issues through consensus instead of contention complements the idea of putting society before self. It means accommodating different views of the way the society should develop, and working hard to develop a consensus on particular courses of action which have majority but not unanimous support, in order to bring as many people on board as possible.[154]

In Singapore, political participation is conducted primarily through government initiated consultations on policy issues and creating offices where citizens can participate in the law-making body. Not only do citizens bring their concerns and articulate their grievances before legislators, they also play a role in the selection of legislators. Voting is the means by which citizens as a people hold the government to account:

> For finally the test of which way the country should go is through the ballot—what policies, and which party, do the electorate support. That way, all who claim to

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151 Cass Sunstein, "Beyond the Republic Revival" (1988) 97 Yale L.J. 1539 at 1541.

152 *Ibid.*

153 The government frowns on 'intemperate activism' which "threatens our social fabric" reminiscent of the "culture wars between the extreme liberals and conservatives" in the US. This was manifest in the strident, vociferous activism of secular liberal groups who were supportive of the pro-homosexualism agenda advocated by AWARE, a local NGO, and who opposed the democratically elected socially conservative new leadership, who eventually resigned: See "TODAY interview with DPM Wong on the government's position on homosexuality", *TODAY* (14 May 2009), online: Channel News Asia <http://www.channelnewsasia.com/stories/specialreport/view/1525/1/.html>. President Nathan recognised a distinct new threat to public order, not from the traditional threat of inter-religious disharmony but conflict between religious and non-religious groups. All parties had to exercise tolerance and respect, including "secular groups which want to strongly push their views and change our social norms" as these could also threaten social harmony if they did not act with restraint, as in the case of the AWARE dispute. President S.R. Nathan, "Building Our Future Singapore in an Uncertain World", Address by President Nathan at the Opening of Parliament (18 May 2009), online: <http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/istana/speech/S-20090518-1.html>.

154 *Shared Values White Paper*, Cmd. 1 of 1991 at para. 14.

> have a better team and plan to lead Singapore are accountable to the people. But we are thankful and humbled that Singaporeans have voted us in 12 successive General Elections since 1959.[155]

In this way, voting rights reflect a conception of citizenship as membership in the Singapore body politic.

C. *Concluding Thoughts: Pragmatism over Metaphysics*

The issue of when constitutional implications may legitimately be recognised is an important one, brought into focus by the express ministerial recognition of the constitutional right to vote. This is fundamentally a question of constitutional interpretation.

Implications are by definition more open-ended than express statements; the interpreter exhibits some degree of creativity, as interpretation is not a mechanistic exercise. Implications perform various functions, including resolving ambiguities, conveying a certain meaning to make a legal instrument effective. However, in some cases, implication is not the drawing out of the meaning of a term but a creative act, as where the framers of the constitution did not direct their minds to a specific question and there is no 'intent' to elucidate. The meaning of a term itself, whether implied or not, may also be indeterminate.

Interpretive choices cannot be unhinged, without logical or substantive limit, and the creativity of the interpreter must be framed by reference to legitimate sources, such as mono or multi-provisional references to texts, extrinsic materials that frame the context like historical understandings or official records of debates, precedent etc. For example, no reliance is placed on the text where a judge declares the existence of implied rights, justifying this by reference to value choices, which raises questions of jurisdiction and legitimacy. If rights are fundamental interests and constitutional rights part of the highest law which limits government power, how does a judge justify finding rights sans textual basis, arrogating the power to assign priority to interests. When is implying a right legitimate and when does it become objectionable as an undemocratic imposition in the spirit of judicial self-aggrandizement?

In Singapore, the government as the elected political branch has declared an implied constitutional right to vote, drawing from 'text and structure' arguments deployed in the Australian implied political communication cases, as well as a normative theory of representative democracy. The fundamental quality of the right to vote is not in doubt, as it is the political right of rights upon which the realisation of other political liberties like the free speech, assembly and association depend.[156] Neither is its centrality in sustaining a democratic order.

Given the undoubted appreciation of the worth of the right to vote, why then the reticence towards including it as a constitutional liberty in Part IV? It is not merely a piece of constitutional esoterica, but fundamental to our polity as the right to vote empowers citizens to select the best governors. Constitutionalising it would further underscore its importance to the man on the street as integral to the practice of representative democracy. There are legal solutions to concerns that an equal

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[155] *Dr. Ng Eng Hen*, *supra* note 133.

[156] Jeremy Waldron, "Participation: The Right of Rights" (1998) 98 Proceedings of the Aristotelian Society 307.

right to vote might bear repercussions for the existing electoral system, but even provisions guaranteeing minority representation can pass constitutional muster, as a fulfillment of article 152 or by being a reasonable classification under article 12. In the worse case scenario, government draftsmen can deploy a notwithstanding clause to immunise a constitutional clause from judicial review.

In the final analysis, perhaps the resistance towards amending the Constitution to include a Part IV right to vote is because the right to vote is not really an individual right, but a limit on legislative power. Parliament would be in dereliction of its constitutional duty if it did not erect a statutory frame to effectuate the right to vote. As discussed above, this does not speak to the quality of the statutory regime, which is one reason why it would be desirable to constitutionally incorporate substantive principles which an electoral regime must conform to.

Leaving the construction of the electoral regime to Parliament evinces a faith in the political process and the wisdom of a representative and responsive Parliament to protect rights and the democratic system. The importance of judicial review is muted in this context, reflecting a Dicey mentality. The great English Jurist claimed that "the will of the electors…by regular and constitutional means (shall) always in the end assert itself as the predominant in the country".[157] This is in Singapore qualified by a elite Neo-Confucianism that focuses on competent good governors,[158] and a very (past) English pragmatism which focus on actual realities rather than paper safeguards. It is reminiscent of what de Smith called the "lukewarm" Anglo-Saxon attitude towards fundamental bills of rights, noting the disutility of abstract declarations in the absence of political will to realise them.[159] As Sir Ivor Jennings noted: "The English constitutional lawyer…does not think of expressing the fundamental ideas which are implicit in his Constitution…On the whole, the politician of tomorrow is more like to be right than the constitutional lawyer of today".[160] So too the Singapore governors prefer "pragmatism to metaphysics", insisting that "the proof of the pudding is in the eating",[161] and rejecting the pursuit of "a system which sounds good in theory, but is unsuited to our conditions and unworkable in practice".[162] Legitimacy, derived from economic performance and political criteria like the holding of regular elections, forms the basis for demanding trust in the sense and sensibility of governors, including the discretion to construct an electoral regime to facilitate the implied basic right to vote.

Post Colonial Singapore has not yet experienced political turnover, which a democratic system seeks to manage in orderly fashion. It remains to be seen whether the democratic exit strategy wielded by the people at the ballot box is able to peacefully remove and replace an ineffective government in whom the People have lost faith.

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157 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885) at 71.

158 "You can have the most ideal system on paper, but without the right people to operate it, it will malfunction and go awry. So we must always have honest, able and committed men and women to come forward to contest elections to serve Singapore".: *PM Lee Hsien Loong*, *supra* note 130.

159 S.A. de Smith, "Fundamental Rights in the New Commonwealth (I)" (1961) 10 I.C.L.Q. 83 at 86.

160 Sir Ivor Jenning, *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1953) at 3-4, 48, 54.

161 De Smith, *supra* note 159.

162 *PM Lee Hsien Loong, supra* note 130.