

Constitutional Law in Malaysia and Singapore BY KEVIN Y.L. TAN AND THIO LI-ANN
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I have two disclosures to make to readers of this review. One is that Tan and Thio are both well known to me personally as colleagues and friends, so readers must take this into account when evaluating my evaluation of this book. The second is that I hate casebooks. As a researcher, I find them confusing, incomplete (despite their density) and unhelpful (because of their density). As a teacher, I dread having to deal with student complaints that the expensive tome is unnecessarily confusing, dense and unhelpful—thus reinforcing the learned helplessness and deference to authority and tradition which the casebook method of teaching is so often criticised for perpetuating—and I resent having to spend hours supplementing and remedying the assigned casebook with my own photocopies, handouts, summaries and class discussion questions.

Happily, *Constitutional Law in Malaysia and Singapore* is in very many ways the direct opposite of this list of shortcomings. It is lucid in architecture and analysis, thorough and well balanced in the choice of topics and cases—and the manner in which cases are edited—and the deft explanations (in the Chapter “Introductions”) and the materials for further reflection, discussion and research (in the “Notes and Questions” following the case excerpts) are thoughtful, intelligent and extremely helpful. For the “Notes and Questions” aspect alone I would use, rather than shun, this book, and indeed as I read through it I could not resist jotting down ideas for student assignments and class discussion points drawn directly from those sections (see *e.g.*, the deceptively simple question at 33: “In your experience, as a citizen or resident of Malaysia or Singapore”—and one could of course substitute Canada or New Zealand *etc.* here—“do you think that the people around you have the same attitude towards power and its limitations as the writers quoted above?”). Rather than the usual disembodied snippets of doctrine, removed from the logic and rhetoric of the case and thus stripped of social and political context and meaning, Tan and Thio usually provide full enough extracts to enable students and teachers to understand what the case is about, to appreciate the development of judicial reasoning, and to comprehend how the featured extract fits with the other cases on the same topic or issue (*e.g.*, *Mamat bin Daud v. Government of Malaysia*, [1988] 1 M.L.J. 119, extracted at 126-133). Introductions expertly situate the cases and indicate what students should look out for in the ensuing extracts (see *e.g.*, the brief introduction to “Supremacy in the Federal Context”, at 124-125).

This third edition arises from the editors’ “combined teaching experience of close to 40 years” (at vi) and reflects their joint and several pedagogical passions and preferences. As they are so clearly masters of the discipline, this is a masterful compilation and they are to be commended for devoting so many hours (which could have been spent on status-accruing “research”) to the production of such a stimulating and valuable teaching resource. Such a learned and expertly assembled casebook deserves a wider readership than the handful of law schools in Malaysia and Singapore, and the editors’ renown as constitutional law scholars and skill in compiling this work ought to garner a much wider audience for the book in comparative constitutional courses.

However, my praise is not unreserved. There are, of course, some things I wish the editors had done differently; several are mentioned below. More substantially, I am both puzzled (although not surprised) and disappointed at the hostility directed at sexual minorities.

Now to the detail. This is a beautiful book. Tan and Thio have heeded readers’ complaints about the appearance of the previous editions (indecipherable fonts and confusing layouts are common to the casebook genre, it must be conceded) and they have considerably refashioned the book into dual columns and larger typeface (see vi). The result is a much more legible work. Inevitably, there are odd typographical errors, but these should be sheeted home not to Tan, who has done an extraordinary job typesetting the manuscript himself to keep costs down (see iv), but rather to the modern publishing practice of relinquishing all responsibility for quality control to authors (to keep costs down). That there are so few typos is a testament to Tan and Thio’s diligence.

The volume is already a hefty 1,504 pages, so one hesitates to harp on omissions; however, I must mention two categories. First, important constitutional documents

were appended to earlier editions in Appendices A–D: U.K., Colonial Office, *Federation of Malaya Constitutional Commission, 1956-1957*, Report Colonial No. 330 (London: Her Majesty's Stationery Office, 1957); Malaya, *Federation of Malaya Constitutional Proposals 1957* (Kuala Lumpur: Government Printer, 1957); Sing., *Report of the Constitutional Commission* (Singapore: Government Printing Office, 1954); and Sing., *Report of the Constitutional Commission, 1966*. As these historical documents are not easily located in university libraries (a fact noted by the editors of the first edition), it would have been most helpful if they had been retained in this third edition. Second, casebooks typically delete the names of counsel, presumably because the traditional casebook mission is to reveal the development of pure doctrine, and so the identity of the lawyers involved in both sides is considered extraneous detail; according to the same rationale, except in rare cases when all the separate and dissenting opinions are included, the composition of the bench is not recorded for each case. Tan and Thio continue these practices. However, these standard omissions prevent students from understanding an important aspect of the politics of the law—all the more important when constitutional issues are litigated—and deny them key information about the patterns of alliance and ideology in legal representation and advocacy, and in judicial decision making. (See also Frank Tuerkheimer, "A Short Essay on the Editing of Cases in Casebooks" (2008) 58 J. Legal Educ. 531).

The first two chapters ("The Rise of Constitutionalism and Constitutional Law" (at 1-52) and "The Constitutional Development of Malaysia and Singapore" (at 53-101)) are conceptual and historical in nature, and the extracted materials should retain student interest well. The next two chapters ("Supremacy of the Constitution and Constitutional Amendments" (at 102-179) and "Special Powers Against Subversion and Emergency Powers" (at 180-298)) introduce students to the notion that a constitution—as the framework and founding instrument of the state—must be supreme, and the complementary idea that it will contain and authorise exceptions under conditions of necessity. Use of the emergency powers by both Singapore and Malaysia has been extremely controversial, and Tan and Thio present the tangled litigation expertly in a lengthy treatment. Chapters 5-9 deal with the branches of government under the separation of powers (Chapter 5, "The Legislature" (at 299-360); Chapter 6, "The Executive" (at 361-441); Chapter 7, "The Attorney-General" (at 442-461); Chapter 8, "The Public Service" (at 462-504); Chapter 9, "The Judiciary" (at 505-625)). The explanation of the unique features of the Singapore electoral system—the elected Presidency, Group Representation Constituencies and Nominated Members of Parliament (at 309-310)—is exemplary and clarifies to this outsider (at last!) how these mechanisms operate. One might wish for a fuller treatment of the Malaysian Conference of Rulers and the discretions of the Sultans in each state (especially in light of the constitutional crisis in Perak, about which Tan has lucidly written elsewhere). The chapter on the Judiciary is long—120 pages—as befits the controversial nature of the institution, at least in Malaysia. There is a useful but brief section on the 1988 Judicial Crisis in Malaysia (at 624-628), and a much lengthier selection of case excerpts concerning the offence of scandalising the court in Singapore (at 579-623). As judicial misconduct and the appointment and elevation of judicial officers have been so fraught in Malaysia for so long, it is a pity that the editors could not find space for some consideration of the new Judicial

Appointments Commission—Singaporeans may have found the contrasting example instructive.

Chapter 10 deals with “Constitutional Interpretation” (at 631-689) in an expert manner, as indeed it should given Thio’s extensive writing on this topic; comparative constitutionalism students will benefit much from reading this section. Chapters 11-20 cover constitutional rights: Chapter 11, “Fundamental Liberties and Human Rights: An Introduction” (at 690-734); Chapter 12, “Protection of Life and Liberty” (at 735-794); Chapter 13, “Rights of the Accused Person” (at 795-835); Chapter 14, “Protection Against Retrospective Criminal Laws” (at 839-854); Chapter 15, “Protection Against Double Jeopardy” (at 855-866); Chapter 16, “The Right to Equality and Equal Protection” (at 871-970); Chapter 17, “Freedom of Speech, Assembly and Association” (at 971-1159); Chapter 18, “Right to Property” (at 1161-1196); Chapter 19, “Freedom of Religion” (at 1197-1343); and Chapter 20, “Citizenship” (at 1345-1383). Again, these chapters are expertly done; the chapter on freedom of religion (the longest chapter of the book) is particularly good, as one would expect, given Thio’s undoubted pre-eminence in this field. My disquiet arises from the treatment of sexual minorities which reprises Thio’s already well-ventilated public position on sexuality rights, or what she terms the “homosexualism agenda”. Many readers will share my distaste for the tone and rhetorical strategies, for example linking homosexuality with paedophilia, bestiality and necrophilia (see 950 and n. 14 at 876), and no doubt find them offensive. But of course one can profoundly disagree with a claim such as “[t]he attempt to universalise ‘sexual orientation’ as a basis for forbidden discrimination as a ‘human rights’ norm is a form of moral imperialism” (n. 14 at 876) and still find the rest of the casebook to be an extremely valuable teaching tool. If presenting this material to students, I would pair it with retired High Court of Australia judge Michael Kirby’s recent Opening Plenary Address to the 15th Malaysian Law Conference in which he described his pain and confusion at discovering as a youth how the law made him an “out-law” for his homosexuality, an attribute he “did not choose and could not change” (“The Rule of Law and the Law of Rules: A Semi-Sceptical Perspective” (delivered at Kuala Lumpur Convention Centre, Malaysia, 29 July 2010) at 25, online: <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=2698&Itemid=332> [“Opening Address”]), and recommended to his Malaysian audience the recent High Court of Delhi decision of *Naz Foundation v. Union of India*, [2009] 4 Law Reports of the Commonwealth 838 [*Naz Foundation*] as an instance where an Asian court has compassionately recognised the constitutional value of equality as inclusiveness, citing Shah C.J. to the effect that “[t]he inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised” (*Naz Foundation* at 895, cited in Opening Address at 25).

In many ways it seems perfectly natural and sensible to assemble a casebook of commentary and legal documents concerning both the Federation of Malaysia and the Republic of Singapore—they share so much history, after all, and previous editions of this casebook (as well as other sub-disciplinary legal texts covering both jurisdictions) have encouraged us to expect the treatment of both countries’ constitutions in

one volume. Use of the coordinating conjunction in learned historical and constitutional commentary, that is to say, perhaps invites us to view these two nations as fundamentally similar because of the common origins of their constitutions and many of their citizens. Yet, politically, the nations are so very different! Indeed, denizens of Malaysia look with disdain across the causeway at quiescent and carefully managed Singapore, just as Singaporeans shake their heads with amusement—and, presumably, relief at the path denied them by expulsion in 1965—at the breathtaking circus that is Malaysian politics. The expression of these political dynamics through constitutional means (whether in parliament or the courts) continues to diverge: the debates about the elected Presidency (at 420-432) will not concern Malaysians; Singaporeans do not need to appreciate the extent of, and fetters upon, the Rulers' discretionary powers; concepts of religious freedom (Chapter 20) are challenged in quite different ways in each jurisdiction; and the judicial branch in each country (Chapter 9) can hardly be compared at all, as statements which are regularly made of judicial officers in Malaysia would be prosecuted as “scandalising the court” in Singapore. Given such differing political and constitutional trajectories, one wonders how much longer it will be possible to contain them within the one volume (see also vi). At the same time, and as the editors note (at v), comparative constitutional studies is a burgeoning field. Students, teachers and scholars of the Malaysian and Singaporean constitutions will learn much by examining the successes, and shortcomings, of each other's foundational document; likewise, students, teachers and scholars of other constitutional arrangements, and of course of comparative constitutionalism, will benefit enormously from this deeply learned volume.

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