

THE COURTS AND THE ‘RULE OF LAW’ IN SINGAPORE

A LECTURE DELIVERED AT THE RULE OF LAW SYMPOSIUM

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I. INTRODUCTION

I would like to start by congratulating all the speakers who have spoken yesterday and up to before the break. After listening to Professor Furmston’s welcome address, the Minister’s keynote speech defending robustly Singapore’s practical conception of the ‘rule of law’, Professor Tamanaha’s magisterial lecture, Professor Weiler’s passionate defence of a ‘rule of law’ that must incorporate the values of democracy and human rights and the Attorney-General and Justice Rajah’s moderation of the views of the experts on their respective panels, I have to say that the better part of the symposium is probably over, with apologies to the panellists and speakers coming later. So I will liven up my lecture by referring to the ‘rule of law’ news in *The Straits Times* this morning.

My lecture will not tell you what form and/or substance the ‘rule of law’ must take or have in order to realise the good society for a particular state, much less a world that is so divided—by differences of nationality, race, culture, religion and wealth. But everyone wants to live in a good society and that is what government is for, to realise it as far as possible. But as Professor Tamanaha says, even if on his preferred definition, the ‘rule of law’ is good, it is not good enough to realise a good society. What else is required? Professor Weiler says that we must accept democracy and human rights as essential elements of the ‘rule of law’. For the late Tom Bingham, despite the differences in conception of the ‘rule of law’, it is the closest thing we have to a universal secular religion. But if theistic religions with millennia of scholarship cannot even agree among themselves, what hope is there for a secular religion? So, this debate will go on.

In Singapore, what form and substance does the ‘rule of law’ take? Actually, Singapore’s political leaders do not talk very much about the ‘rule of law’. The Minister has referred to Mr. Lee Kuan Yew’s speech on the ‘rule of law’, but that

* Former Chief Justice, Supreme Court of Singapore. This paper is a slightly modified version of a lecture originally delivered on 15 February 2012 at the Rule of Law Symposium held in Singapore. I would like to acknowledge my debt to Mr. Jordan Tan, Assistant Registrar, Supreme Court of Singapore, for assisting me in preparing and checking the contents of this paper. All defects, deficiencies and errors are mine.

speech was given in 1962 to the Singapore Law Society (which was actually the N.U.S. Law Students Society). I was present at the dinner when that speech was delivered. You will not find many speeches made by Mr. Lee where he talks about what the 'rule of law' can do for Singapore. He has said many times that he is not concerned with ideologies but with what works to create a good society. But, that does not mean he has no interest in justice and equity. It is only more recently that our Law Ministers have talked about the 'rule of law' more often when they find it necessary to defend Singapore's governance whenever it is attacked by critics for ruling *by* law and not by the 'rule of law'.

Professor Weiler made an impassioned plea for Singapore to join in the international discourse on the 'rule of law' because Singapore has many good things it can offer to the world. It is very kind of him to say that. But, although Singapore is a well-governed state, it is a tiny state that exhibits its virtues by example and precept rather than by promotion. In international relations, there is such a thing as a 'big state versus a small state' syndrome.

Many formulations of the 'rule of law' have been suggested by scholars and organisations to promote their own ideas of the 'rule of law' and their goals, such as, to name a few: (a) A.V. Dicey in 1885;¹ (b) the International Bar Council in 2005;² or (c) the World Justice Project³ in 2006. Singapore's laws and legal system satisfy these definitions at a very high level in some criteria but not in others.

¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd ed. (London: Macmillan, 1889). The first edition was published in 1885. Dicey's formulation is as follows (at 175, 181-183):

- (a) No one can be punished or made to suffer except for a breach of law proved in an ordinary court.
- (b) No one is above the law and everyone is equal before the law regardless of social, economic, or political status.
- (c) The rule of law includes the results of judicial decisions determining the rights of private persons.

² The International Bar Association, *Rule of Law Resolution* (September 2005), online: International Bar Association <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=A19DE354-A0D7-4B17-A7FF-F6948081CD85>>. The International Bar Association's conception is as follows (at para. 2):

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable.

³ Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011* (Washington D.C.: The World Justice Project, 2011), online: The World Justice Project <http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf>. The World Justice Project, which compiles and publishes the *Rule of Law Index* annually has the following conception (at 9):

- (a) The government and its officials and agents are accountable under the law.
- (b) The laws are clear, publicized, stable, fair, and protect fundamental rights, including the security of persons and property.
- (c) The process by which the laws are enacted, administered, and enforced is accessible, efficient, and fair.
- (d) Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Singapore has been a multi-racial, multi-religious and multi-lingual Asian society from its foundation. This is why the Government has inculcated certain shared societal values that will create the necessary social cohesion for the nation to survive and progress. It has also adopted a political and legal system and implemented socio-economic policies to overcome our natural deficits in land, people and resources. Singapore is not a “liberal democracy” as that term is commonly defined, but it has an elected government and an elected President with powers to check the imprudent exercise of executive power. The Government can be voted out at a general election by the electorate. Voting is compulsory. It has an independent Judiciary to check the excessive or unlawful exercise of legislative or executive power. Described as promoting a “communitarian democracy”,⁴ the Government has, within a few decades, created a peaceful, secure and stable society with a standard of living equal to that of some of the most developed countries in the West.

Why then do organisations such as the Human Rights Watch and the International Bar Association, and respected scholars continuously target Singapore for censure? As hinted at by Assistant Professor Jack Lee, the answer lies in differences in ideology, and not so much in law or legal systems. After all, Singapore has a common law legal system like the countries from which many of these criticisms emanate. Thomas Carothers observed thus in his article “Rule of Law Temptations”:⁵

Sometimes the differences [in interpretation and operational emphases] are rooted in ideology. Conservatives often embrace the rule of law as a desirable developmental objective because they find in it things they especially value, such as property rights, fair treatment of foreign investors, strong police, and a general emphasis on law and order. Persons on the left, however, read the concept differently. They see in it a focus on rights and on fair and equal treatment for all, a focus that will help boost disadvantaged people and empower citizens generally. Meanwhile, centrists are drawn to the rule of law as a technocratic ideal, one that encompasses key elements contributing to good governance, such as governmental accountability, transparency, and anticorruption.

Hence, despite, or perhaps because of, Singapore’s successful model of governance, critics⁶ say that Singapore is an authoritarian state—that Singaporeans have paid a heavy price for its economic success; that they have lost their freedoms, such as freedom of speech and expression, of assembly and association; that they dare not express their views against government policies for fear of reprisals;⁷ that the media

⁴ See Li-ann Thio, “Rule of Law within a Non-Liberal ‘Communitarian’ Democracy: The Singapore Experience” in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: RoutledgeCurzon, 2004) 183 [Thio, “Rule of Law”].

⁵ (2009) 33 *The Fletcher Forum of World Affairs* 49 at 52, online: Carnegie Endowment for International Peace <http://www.carnegieendowment.org/files/Rule_of_Law_Temptations.pdf> (last accessed 6 October 2012).

⁶ Such as Amnesty International, the Human Rights Watch, the International Bar Association’s Human Rights Institute, the Asia Law Watch, the Canadian Law Watch, and the Western liberal media, including the *New York Times* and its sister newspaper, the *International Herald Tribune*, the *Wall Street Journal* and the now defunct *Far Eastern Review*, the *Financial Times*, etc.

⁷ See e.g., (a) the 2008 International Bar Association report: International Bar Association, “Prosperity Versus Individual Rights? Human Rights Democracy and the Rule of Law in Singapore”, online: International Bar Association <http://www.ibanet.org/Human_Rights_Institute/Work_by_

are controlled and muzzled; and that the Government abuses the law and makes use of compliant courts to bankrupt political opponents and to mulct the foreign media in defamation suits *etc.* Others theorise the existence of a silent pact between the population and the Government to leave each other to do their own thing—Singapore is the home of the Faustian trade-off in its purest form.⁸

This pathological aversion to Singapore's governance may be illustrated by articles like William Safire's "The Misrule of Law: Singapore's Legal Racket" where he compared Singapore's governance to that of Nazi Germany and Communist Russia.⁹ He accused the Government of using "a corrupted and compliant judiciary to cloak with legitimacy the regime's need to lock up, torture or drive out any who dared oppose them".¹⁰ He spelt out his ideological premise as follows:¹¹

Why should this bother us? The regional reason: Singapore's ultra-orderly economy and anti-democratic critics make up the dangerous "model" being followed by China. A broader reason: The Singapore virus—the notion that capitalist prosperity can be abetted by political repression—could infect the global economy with its strain of fascism.

Singapore's model of development is seen as an unacceptable rival to liberal democracy and its values because it does have its admirers. In his 2008 book, *The Second World: Empires and Influence in the New Global Order*, Parag Khanna wrote, "Singapore is the most successful avatar of the Asian way—and a model packaged for export."¹² In May 2011, he wrote:¹³

Emerging markets around the world are searching for a new model in a post-Washington Consensus world. Some have suggested a "Beijing Consensus" of economic reform without political reform, given the Middle Kingdom's spectacular rise to superpower status.

Yet it is in fact the Singapore Consensus, not the Beijing Consensus, that is likely to win the 21st-century competition over governance models.

Criticisms driven by ideological differences can never be satisfactorily answered or rebutted, for that very reason. They will not cease until there is a convergence of

regions/Asia_Pacific/Singapore.aspx> (last accessed 6 October 2012); and (b) the 2007 Lawyers' Rights Watch Canada report: Kelley Bryan, "Rule of Law in Singapore: Independence of the Judiciary and the Legal Profession in Singapore", online: Lawyers' Rights Watch Canada <http://www.lrwc.org/ws/wp-content/uploads/2012/03/LRWC.Rule_of_Law_in_Singapore.17.Oct._07.pdf> (last accessed 6 October 2012).

⁸ John Kampfner, *Freedom For Sale: How We Made Money and Lost Our Liberty* (London: Simon & Schuster, 2009) at 15–40.

⁹ *The New York Times* (1 June 1997) E17, online: Gainsville Sun <<http://news.google.com/newspapers?id=pkdWAAAIBAJ&sjid=2OoDAAAIBAJ&pg=5380%2C619497>> (last accessed 6 October 2012). Bernard Levin also wrote in a similar vein in *The Times*: see Bernard Levin, "The Law Grossly Misused" *The Times [of London]* (19 June 1989) (Lexis).

¹⁰ Safire, *ibid.*

¹¹ *Ibid.*

¹² 1st ed. (New York: Random House, 2008) at 272. An article published in *The Financial Times* (17 January 2012) on the Asian economies provided data which showed that Singapore is the richest country in Asia measured by *per capita* GDP at US\$50,700 with Japan second at US\$45,800.

¹³ See Parag Khanna, "LeeKuanYew-istan Forever" *Foreign Policy* (24 May 2011) at 1, online: Foreign Policy <http://www.foreignpolicy.com/articles/2011/05/24/leekuanyewistan_forever> (last accessed 6 October 2012).

such values. Criticisms of Singapore's governance and legal system come from two sources—foreign and local. For present purposes, I put aside criticisms from both foreign and local sources based on ideological or political considerations. They properly belong to the sphere of political debate and discourse. I have said before that judges are not professors.

Some of the criticisms made by our local academics are in concordance with those of foreign criticisms in so far as they imply that court decisions tend to favour the Government against its opponents. Since judges give full reasons for their decisions, the judgments speak for themselves. And so, by convention, they do not defend themselves at public forums. What I propose to do in the remainder of my lecture is to provide the factual and forensic backgrounds to some of the more important judgments on Singapore constitutional law which have not been fairly criticised because critics might not have been aware as to how the case was pleaded and actually argued or the full extent of the evidence adduced before the court. Critics can only read the text of the judgment, and usually nothing more. I also intend to discuss one particular clause in the *Constitution of the Republic of Singapore*¹⁴ on fundamental liberties, which has been the main cause of these criticisms.

There is a very substantial body of academic writing on the courts' decisions pertaining to the rule of law in Singapore. In 2004, Professor Thio Li-ann wrote an excellent account on the subject in the book, *Asian Discourses of Rule of Law*, with the title "Rule of Law within a Non-liberal 'Communitarian' Democracy: The Singapore Experience".¹⁵ In 2009, she and her colleague, Dr. Kevin Tan, edited a collection of ten essays to mark 40 years of the Singapore *Constitution*. The book was published under the title *Evolution of a Revolution—Forty Years of the Singapore Constitution*.¹⁶ The overall tenor of these articles seems to suggest that court decisions have led to the development during this period of a power-based judicial culture, rather than a rights-based judicial culture.

Let me start by making the point that it is one thing to criticise a judge for deciding a case wrongly on the facts or the law, whether as a result of ignorance of the law, applying the wrong law, applying it too widely or too narrowly, or making wrong findings of fact. This is wholly unexceptional and is indeed the function of law academics, so as to promote the sound development of the law. But, it is an entirely different thing to accuse the courts of having the same political or ideological views of the Government and allowing these views to colour their decisions in cases involving the Government and the foreign media or opposition politicians, or even ordinary citizens. It is equally objectionable to suggest that the judge has deliberately disregarded or ignored the law for this purpose.

The Judiciary is aware of its responsibilities as the third arm of the state. Whatever their personal political persuasions, judges do not let political considerations influence their decisions. Public policy considerations—yes, but only where the law requires them to do so, *e.g.*, where a statutory provision is ambiguous, which is

¹⁴ *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Constitution*].

¹⁵ *Supra* note 4.

¹⁶ Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Abingdon: Routledge-Cavendish, 2009) [Thio & Tan, *Evolution of a Revolution*].

sometimes the case. Judges do justice, not politics. In the words of Justice Choo Han Teck in *Yap Keng Ho v. Public Prosecutor*:¹⁷

[J]ustice and the rule of law require that only relevant issues are addressed... Political motives and manoeuvres have no relevance no matter which party was involved—whether the party who initiated the proceedings or the party wishing to disrupt it. The court is only concerned with the legal issues and no more.

Like all common law judges, Singapore judges are not free to decide as they like. They are bound by established principles of law and procedure. Judges exercise a limited discretion where legal principles are open-textured, but in the case of legislation, they have to respect the statutory text. Judges do not know all the law, and legal counsel are there to assist them. If counsel fail in their duties, which happens on occasions, judges can make mistakes of law. When such decisions come to light they are not followed, distinguished, or overruled. And so, if a judge decides a case wrongly, the reason is usually benign and may be regrettable but it is hardly sinister or the result of ideological leadings. Let me refer to one decision to make this point.

In *Abdul Wahab bin Sulaiman v. Commandant, Tanglin Detention Barracks*,¹⁸ the applicant was given an enhanced sentence on appeal to the Military Court of Appeal after he had served his original sentence and was discharged from National Service. He applied to the High Court for a writ of habeas corpus against his detention. His counsel argued that the Military Court of Appeal had no jurisdiction to hear the appeal because the applicant had completed his National Service. State Counsel for the respondent argued otherwise, that in any event, the High Court could not issue a writ of habeas corpus against the Military Court of Appeal because it was a superior court, citing English precedents. The High Court agreed with State Counsel and dismissed the application. This decision has been consistently criticised as being “clearly wrong”,¹⁹ for failing to consider or ignoring arts. 9 and 93 of the *Constitution*, and embellished for “completely [removing] the Singapore Constitution as a legal limit on Parliament or Cabinet”, when the decision was concerned with whether the Military Court of Appeal’s decision was subject to review.²⁰ What was not pointed out was that applicant’s counsel did not argue that the decision of the Military Court of Appeal was subject to judicial review by virtue of art. 93 of the *Constitution*.²¹ If the correct argument had been made to the Judge, he might very well have come to a different decision. And so, given the context, it is not quite fair to criticise the judge as having *ignored* the *Constitution*.

II. SINGAPORE’S LEGAL HISTORY

Before I go on to deal with the other criticisms, some background about our judicial heritage is pertinent. The ‘rule of law’ as first expounded by Dicey in print in 1885

¹⁷ [2007] 1 S.L.R.(R.) 259 at para. 8 (H.C.).

¹⁸ [1985-1986] S.L.R.(R.) 7 (H.C.).

¹⁹ Kevin Y.L. Tan, “Writing the Constitution: Forty Years of Singapore Constitutional Scholarship” in Thio & Tan, *Evolution of a Revolution*, *supra* note 16, 288 at 311.

²⁰ Jaclyn Ling-Chien Neo & Yvonne C.L. Lee, “Constitutional Supremacy: Still a Little Dicey” in Thio & Tan, *ibid.*, 153 at 156, n. 21.

²¹ See the Judge’s Notes of Evidence, 21 and 27 September 1984.

was already an established principle of government in 1824 when Singapore became a British possession. In his lecture on "Courts and the Rule of Law" delivered in 2001, Chief Justice Gleeson referred to a letter written by Chief Justice Forbes of the New South Wales to the Colonial Office in 1827, which stated as follows:²²

The notion of control is inconsistent with the nature of a Supreme Court... the judicial office... stands uncontrolled and independent, and bowing to no power but the supremacy of law.

Even earlier, in 1803 in Penang (then called Prince of Wales Island), the first Judge and Magistrate of Penang Mr. Dickens,²³ had written to the Acting Lieutenant-Governor of Penang, employing separation of powers discourse, to protest against his uniting legislative, executive and judicial powers in himself, *i.e.* charging and passing a judgment finding a gardener guilty of theft under a law promulgated by him.²⁴

From 1824 to today, the fundamental structure of our legal system enacting the 'rule of law' has remained substantially the same. Our *Constitution* is based on the 1963 *Constitution of Malaysia*,²⁵ which is in turn based on the 1957 *Constitution of the Federation of Malaya*,²⁶ a Westminster constitution. It has a bill of rights, with restrictions, based on the *Constitution of India, 1950*²⁷ and was crafted to meet the social and political conditions of the time. Malaya and Singapore were under a state of emergency and internal security was under threat by the communists.

After Singapore left Malaysia on 9 August 1965, a Constitutional Commission was established in 1966 to recommend measures to safeguard the rights of the racial, linguistic and religious minorities.²⁸ Chaired by Chief Justice Wee Chong Jin

²² Letter from Forbes C.J. to the Under-Secretary of State for the Colonies (1827) in J.M. Bennett, *Some Papers of Sir Francis Bennett: First Chief Justice in Australia* (Sydney: Parliament of New South Wales, 1998) at 143, cited in Murray Gleeson, "Courts and the Rule of Law" (The Rule of Law Series, delivered at Melbourne University, 7 November 2001) in Cheryl Saunders & Katherine Le Roy, eds., *The Rule of Law* (Sydney: Federation Press, 2003) 178 at 179, online: High Court of Australia <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm> (last accessed 6 October 2011).

²³ Penang was acquired by the British in 1786.

²⁴ James William Norton Kyshe, ed., *Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements 1808-1884* (Somerset: Legal Library (Publishing) Services, 1885) vol. 1. Mr. Dickens wrote as follows (at xvi, para. 5; emphasis in original):

[Y]ou have united, in your own person, *legislative powers*, by enacting of your sole authority, as a law, binding [if it could bind] me as Judge, the regulation passed by you of the 18th December, 1802, *judicial powers* by the secret examination taken, and positive judgment given, in a cause wherein, the Government, that is, yourself, representing the Government, is a party, and *executive powers* by carrying that judgment into execution, yourself. You have in a manner said—So I order, my will shall be the Law. It is not for me to say, what are the limits of your powers as Acting Lieutenant-Governor... but permit me respectfully to decline, taking any part in carrying *your judgment* against Carni into execution. I still think that he was innocent, of the crime, of which he was accused,* and that a man should not be convicted, until his guilt is proved. The escape of a delinquent of that or any other description can never do so much harm, as must arise, from the infraction of a rule, upon which the purity of public justice depends...

*Carni, a gardener was charged for stealing 247 nutmeg plants, the property of the United Company.

²⁵ [*Malaysian Constitution*].

²⁶ [*Malayan Constitution*].

²⁷ [*Indian Constitution*].

²⁸ Sing., Constitutional Commission, 1966, *Report of the Constitutional Commission 1966* (Singapore: Government Printer, 1966).

and composed of lawyers,²⁹ the Commission exceeded its terms of reference and recommended a number of new constitutional protections which were rejected.³⁰ The Government decided to maintain the *status quo* to meet the “felt necessities” of the time. There was no “liberal moment” in settling the terms of either the 1957 *Malayan Constitution* or the *Singapore Constitution*.

Nonetheless, Singapore’s *Constitution* is based on the separation of powers, which requires the Legislature, the Executive and the Judiciary to act within their own sphere of constitutional power. The *Constitution* declares itself the supreme law—a declaration respected by the Government. Any law passed by Parliament which is inconsistent with the *Constitution* is, to that extent, void. The *Constitution* does not provide for a constitutional court to resolve constitutional conflicts, but instead vests the judicial power of Singapore in the courts. Consequently, the Judiciary has claimed for itself the exclusive power to adjudicate on the constitutionality of laws and executive acts, a claim also respected by the Government. It was on the basis of these principles that the Court of Appeal declared in *Chng Suan Tze v. Minister for Home Affairs* that “the notion of a subjective or unfettered discretion is contrary to the rule of law”³¹ and that “[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”³² The ‘rule of law’ is an integral part of the *Constitution* as much as the *Constitution* establishes the ‘rule of law’.

Coming back to the book, *Evolution of a Revolution*, it concluded with this hopeful note:³³

The power-justice-culture elements in the constitution may well change with the exigencies of a new season, as the next generation continues to work out its own constitutional salvation.

If this conclusion is correct, salvation from the Judiciary has to wait a bit longer, as I do not even belong to the present generation of judges. I am past my constitutional retirement age. I come from a time and a state where the Malayan Emergency began in 1948. I was studying law in Singapore when the Emergency ended in 1960, but not the risks of subversion and turmoil.³⁴ Singapore by then had also experienced a very serious racial/religious riot. I practised law here when there was law but not much order, as nascent Singapore was faced with labour strikes and student riots, secret societies activities, and a communist or left-wing threat. I have lived through the entire period of Singapore’s formational and developmental periods. It would not be possible for me to deny that these developments would not have influenced

²⁹ Save for Mr. Kirpal Singh, the rest of the commission, Wee Chong Jin C.J., A.P. Rajah, C.F.J. Ess, M.J. Namazie, C.C. Tan, S.H.D. Elias, Syed Esa bin Syed Hassan Almenoar, G. Abisheganaden, G. Starforth Hill and Abdul Manaf Ghows, were educated in the U.K.

³⁰ For a fuller account, see Li-ann Thio, “The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission” in Thio & Tan, *Evolution of a Revolution*, *supra* note 16, 7, and also the discussion by the Court of Appeal in *Yong Vui Kong v. Public Prosecutor* [2010] 3 S.L.R. 489.

³¹ [1988] 2 S.L.R.(R.) 525 at para. 86 [*Chng Suan Tze*].

³² *Ibid.*

³³ Li-Ann Thio, “In Search of the Singapore Constitution: Retrospect and Prospect” in Thio & Tan, *Evolution of a Revolution*, *supra* note 16, 323 at 360.

³⁴ See *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 M.L.J. 129 at 139 (Federal Court), Ong C.J. (Malaysia): “The twelve-year Emergency ended in 1960 but not the risks of subversion and turmoil.”

me, even unconsciously, as to how the *Constitution* should be read in the context of any particular case. You will need to take this factor into account in assessing the views I have expressed here.

An independent Judiciary is absolutely essential to the 'rule of law', and vice versa. Critics routinely assert that judicial independence is not possible given the current system of judicial appointments.³⁵ The only answer to this kind of theoretical comments is that it does not necessarily reflect reality.³⁶ In the case of Singapore, it is not in the national interest for the Government to have a subservient Judiciary.³⁷ During my first tenure as a Judge from 1986-1992, I heard a fair number of public law cases.³⁸ The decisions were fairly divided between those decided for and against the Government. Public confidence demands that the 'rule of law' be respected by the courts.³⁹ That was why, during my tenure as Attorney-General, I referred court decisions to a higher court for clarification or correction, *e.g.*, (a) whether s. 199 of the *Criminal Procedure Code*⁴⁰ was inconsistent with art. 93 of the *Constitution*;⁴¹ (b) the true meaning of "official secrets" in the *Official Secrets Act*;⁴² and (c) a sentence imposed on an accused which was actually to the advantage of the Prosecution.⁴³

³⁵ See Tsun Hang Tey, "Judicial Internalising of Singapore's Supreme Political Ideology" (2010) 40 Hong Kong L.J. 293 at 298 [Tey, "Judicial Internalising"].

³⁶ See Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" [2010] 22 Sing. Ac. L.J. 229.

³⁷ Michael D. Barr, in his book, *Lee Kuan Yew: The Beliefs behind the Man* (Richmond: Curzon, 2000) made this point on the Judiciary's relationship with the Government (at 61):

[T]he principles enunciated here have since permeated the PAP [*i.e.* the People's Action Party, the ruling political party in Singapore since 1959] regime's philosophy of law and politics, and its relationship with the judiciary. The law is a tool for bringing about progress and cultural change. It is not a sacrosanct set of principles, but is one of the means by which society transforms itself, defines itself and evolves. The Singapore judiciary, therefore, should not be regarded as subservient to the government, despite the apparent ease with which the government and its ministers seem to win in the courts. Indeed, institutionally it would be difficult to argue that the Singapore judiciary... is subservient to the government. Rather the courts are merely acting in accord with the needs and wishes of society and following well-established precedent and case law. If the judiciary were to adopt an alternative course, it would be expressing an unacceptable and unreasonable alternative philosophy of law and society... According to this logic, such a course of action would be tantamount to usurping the legislative role of Parliament.

³⁸ They include the following: (a) *Heng Kai Kok v. A.G.* [1985-1986] S.L.R.(R.) 922 (H.C.); (b) *Cheong Seok Leng v. Public Prosecutor* [1988] 1 S.L.R.(R.) 530 (H.C.); (c) *Chng Suan Tze*, *supra* note 31; (d) *Jeyaretnam Joshua Benjamin v. A.G.* [1988] 2 S.L.R.(R.) 571 (C.A.); (e) *Dow Jones Publishing Co (Asia) Inc v. A.G.* [1989] 1 S.L.R.(R.) 637 (C.A.) [*Dow Jones*]; (f) *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos* [1989] 1 S.L.R.(R.) 563 (H.C.); (g) *Kwek Juan Bok Lawrence v. Lim Han Yong* [1989] 1 S.L.R.(R.) 675 (H.C.); (h) *Jeyaretnam Joshua Benjamin v. Public Prosecutor* [1989] 2 S.L.R.(R.) 419 (H.C.); (i) *Public Prosecutor v. Ang Soon Huat* [1990] 2 S.L.R.(R.) 246 (H.C.); (j) *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 347 (C.A.) [*Teo Soh Lung* (C.A.)]; (k) *Re Fong Thin Choo* [1991] 1 S.L.R.(R.) 774 (H.C.); and (l) *Public Prosecutor v. Tan Teck Hin* [1992] 1 S.L.R.(R.) 672 (C.A.).

³⁹ See Gleeson, *supra* note 22.

⁴⁰ Then Cap. 68, 1985 Rev. Ed. Sing.

⁴¹ See *Public Prosecutor v. Norzian bin Bintat* [1995] 3 S.L.R.(R.) 105 (H.C.).

⁴² Then Cap. 233, 1970 Rev. Ed. Sing. See *Public Prosecutor v. Phua Keng Tong* [1985-1986] S.L.R.(R.) 545 (H.C.).

⁴³ See *Louis Pius Gilbert v. Public Prosecutor* [2003] 1 S.L.R.(R.) 417 before the High Court and *Public Prosecutor v. Louis Pius Gilbert* [2003] 3 S.L.R.(R.) 418 before the Court of Appeal.

Like their judicial colleagues in other Commonwealth jurisdictions, Singapore judges have frequently expressed their decisions and rulings in terms of what the ‘rule of law’ requires. Here are some examples:

- (a) Everyone is subject to the law;⁴⁴
- (b) ‘Rule of law’ dictates that all powers have legal limits; subjective or unfettered discretion is contrary to the rule of law;⁴⁵
- (c) To uphold the ‘rule of law’, courts will not tolerate abuse of governmental power;⁴⁶
- (d) The courts are also subject to the ‘rule of law’ and their purpose is to serve the ‘rule of law’;⁴⁷
- (e) Procedural justice is one of the twin pillars of the ‘rule of law’;⁴⁸
- (f) Legal certainty is fundamental to the ‘rule of law’;⁴⁹
- (g) Law of contempt is vital to the ‘rule of law’;⁵⁰ and
- (h) Adherence to the law is the essence of the ‘rule of law’.⁵¹

These reiterations of the ‘rule of law’ as the bases of the courts’ decisions have not spared the courts from negative comments that the courts have failed to give effect to the fundamental liberties in the *Constitution*. The trend may be said to have started in 1973 from a case concerning *Newsweek* magazine, where a local stringer, amongst others, was found guilty of contempt of court for providing inaccurate “background information” on court proceedings in Singapore to cause *Newsweek* to publish a contemptuous article.⁵² The decision was immediately criticised by the foreign media and also two local law academics.⁵³ This trend has continued particularly with decisions on free speech. Many such articles are published in foreign law journals.⁵⁴

⁴⁴ *Chua Tiong Tiong v. Public Prosecutor* [2001] 2 S.L.R.(R.) 515 (H.C.).

⁴⁵ *Chng Suan Tze*, *supra* note 31.

⁴⁶ *Teng Fuh Holdings Pte Ltd v. Collector of Land Revenue* [2006] 3 S.L.R.(R.) 507 (H.C.); *Pang Chen Suan v. Commissioner for Labour* [2008] 3 S.L.R.(R.) 648 (C.A.).

⁴⁷ *Re Application by Yee Yut Ee* [1977-1978] S.L.R.(R.) 490 (H.C.); *Salijah bte Ab Latef v. Mohd Irwan bin Abdullah Teo* [1996] 2 S.L.R.(R.) 80 (C.A.); *Su Sh-Hsyu v. Wee Yue Chew* [2007] 3 S.L.R.(R.) 673 (C.A.).

⁴⁸ *Lee Hsien Loong v. Singapore Democratic Party* [2008] 1 S.L.R.(R.) 757 (C.A.).

⁴⁹ *The “Seaway”* [2004] 2 S.L.R.(R.) 577 (H.C.).

⁵⁰ *OCM Opportunities Fund II, LP v. Burhan Uray* [2005] 3 S.L.R.(R.) 60 (H.C.); *Pertamina Energy Trading Ltd v. Karaha Bodas Co LLC* [2007] 2 S.L.R.(R.) 518 (C.A.); *A.G. v. Hertzberg Daniel* [2009] 1 S.L.R.(R.) 1103 (H.C.); *A.G. v. Shadrake Alan* [2011] 2 S.L.R. 445 (H.C.).

⁵¹ *Evergreen International SA v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R.(R.) 457 (H.C.).

⁵² *A.G. v. Pang Cheng Lian* [1974-1976] S.L.R.(R.) 271 (H.C.).

⁵³ F.A. Trindade & H.P. Lee, “Freelance Journalists and Contempt of Court” (1975) 17 Mal. L. Rev. 233 at 236.

⁵⁴ In this connection, it may be of some interest to note that in the early 1990s, a local law graduate doing his LL.M. course on a Fulbright scholarship at Harvard wrote a prize-winning thesis on bridging Eastern and Western perspectives on human rights. It won the law school’s Laylin Prize for the best thesis in international law. The editors of the Harvard Law Journal told him they saw no difficulty in publishing an article based on the thesis. However, *A.G. v. Lingle* [1995] 1 S.L.R.(R.) 199 [*Lingle*] intervened, as well as the controversy surrounding the conferment of an honorary degree by Williams College on Mr. Goh Chok Tong, then the Prime Minister. These events caused Safire to write the article I have referred to earlier (*supra* note 9). As a result, the editors rejected the article, giving the reason that a reviewer had found the article “not critical enough” of Singapore to merit publication. For a fuller account of this episode, see Simon Tay, *Alien Asian: A Singapore in America* (Singapore: Landmark-Books, 1997).

Let me now discuss another case which has troubled our academics—*Taw Cheng Kong v. Public Prosecutor*.⁵⁵ In this case, the High Court held that s. 37 of the *Prevention of Corruption Act*,⁵⁶ which makes it an offence for Singapore citizens to commit corruption outside Singapore, was unconstitutional because: (a) Parliament had no power to legislate extraterritorially; and (b) it violated art. 12 of the *Constitution* on equality before the law.⁵⁷ As Attorney-General, I referred the case to the Court of Appeal which reversed the High Court's ruling that s. 37 of the *Prevention of Corruption Act* was unconstitutional.⁵⁸

Academic writings refer to this case to suggest that the courts routinely defer to Parliament. Here are two such comments:⁵⁹

It is telling that in Singapore, only one legislative provision has been struck down by a Singapore court in the last 42 years. Even then, this decision [*i.e. Taw Cheng Kong* (H.C.)] was overturned on appeal, on separate grounds.

...

The conversation between the High Court and the Court of Appeal... reveals the weakness of the courts as an *effective constraint on the legislative and executive powers*. This arises largely from the courts' deference to political wisdom which impacts upon their fidelity to the Constitution, in particular, the protection of fundamental liberties. As a result, the courts have taken a legalistic view of the Constitution and [have] adopted a strong presumption of constitutionality.

These comments imply that while the High Court was upright, the Court of Appeal was supine. No concession was made that the High Court could be wrong, and the Court of Appeal correct, in law.⁶⁰ Such comments suggest that any attempt to invalidate any legislation, however arbitrary or oppressive it may be, is a waste of time. Indeed Chief Justice Yong Pung How's robust statement in *Jabar bin Kadermastan v. Public Prosecutor* that the courts are "not concerned with whether [any law validly passed by Parliament] is also fair, just and reasonable as well"⁶¹ has received

⁵⁵ [1998] 1 S.L.R.(R.) 78 (H.C.) [*Taw Cheng Kong* (H.C.)].

⁵⁶ Cap. 241, 1993 Rev. Ed. Sing.

⁵⁷ Taw, a Government of Singapore Investment Corporation officer and a Singapore citizen, was charged in the District Court under the *Prevention of Corruption Act*, *ibid.* for corruption committed in Malaysia. The High Court set aside the conviction on the ground that Parliament had no power to legislate extraterritorially, and further, that provision was discriminatory against Singapore citizens. On the first ground, the judge held that when Malaysia granted independence to Singapore in 1965, it deliberately omitted to transfer such legislative power to Singapore. On the second ground, the judge held that equality before the law under art. 12 of the *Constitution* was violated because the provision did not apply to a non-citizen resident in Singapore.

⁵⁸ See *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R.(R.) 489 [*Taw Cheng Kong* (C.A.)].

⁵⁹ Neo & Lee, *supra* note 20 at 174, 175 [emphasis added].

⁶⁰ A moment's reflection will lead a constitutional scholar to conclude that, as a matter of constitutional law, it is constitutionally impossible for the legislature of a sovereign state not to have such legislative power. As for equality before the law, the Court of Appeal held that in the interest of observing international comity not to legislate in criminal matters against non-citizens outside Singapore, citizenship alone was a rational differentiation under art. 12 of the *Constitution*. It may be worth disclosing that the N.U.S. Law Faculty was so excited by the High Court decision that it immediately organised a seminar to discuss the case. When the Court of Appeal inevitably reversed both the High Court's rulings, no seminar was, to my knowledge, held to discuss that decision.

⁶¹ [1995] 1 S.L.R.(R.) 326 at para. 52 (C.A.) [*Jabar*].

sustained academic criticism, such as: (a) the statement reflected an “*abdication of judicial function*”,⁶² and (b) it “[reflects] a thin positivist conception of rule of law *shorn of ethical content*.”⁶³ These criticisms ignore Chief Justice Yong’s equally robust statement in *Taw Cheng Kong (C.A.)* as follows:⁶⁴

Questions on the constitutionality of our laws and whether they have been enacted *ultra vires* the powers of the Legislature are matters of grave concern for our nation as a whole. The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land.

In *Jabar*, the appellant argued that a five-year delay in executing his death sentence made it “inhuman punishment” contrary to art. 9(1) which provided that “[n]o person shall be deprived of his life or personal liberty save in accordance with law”. This argument was based on the Privy Council’s decision in *Pratt v. A.G. for Jamaica*,⁶⁵ that a prolonged delay in the execution of a death sentence rendered the sentence unconstitutional as amounting to “inhuman punishment” (which was expressly prohibited by the *Jamaican Constitution*⁶⁶). The Court of Appeal rejected this argument and held, following the decision of the U.S. Court of Appeals in *Richmond v. Lewis*⁶⁷ that where the delay was occasioned by the accused initiating unmeritorious legal proceedings, the execution of the sentence was not cruel and unusual punishment under the *US Constitution* (which contained such a prohibition). Not only was Chief Justice Yong’s statement taken out of context, as it did not concern the constitutionality of legislation but of the execution of a sentence, it was given a meaning that made it inconsistent with Lord Diplock’s statement in *Ong Ah Chuan v. Public Prosecutor*⁶⁸—that “law” in art. 9 of the *Constitution* did not mean any law passed by Parliament, however absurd or arbitrary it might be.⁶⁹

⁶² Tey, “Judicial Internalising”, *supra* note 35 at 305 [emphasis added].

⁶³ See Thio, “Rule of Law”, *supra* note 4 at 197 [emphasis added]. As regards the issue of whether law, to be law, must have an ethical content, in so far as the courts will not uphold a law which is absurd or arbitrary, certain unethical laws will fall afoul of this criterion. But it is not possible to provide a comprehensive answer to this question in the abstract. It is customary of academics to pose questions in the abstract, or hypothetically, but judges do not judge in that way. As U.S. Federal Court Judge Richard Posner has said, in an essay with the title, “Judges are not Law Professors” (in Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008) c. 8). The courts decide concrete constitutional and legal issues in dispute, not in contemplation.

⁶⁴ *Supra* note 58 at para. 89.

⁶⁵ [1994] 2 A.C. 1 [*Pratt*].

⁶⁶ *The Jamaica (Constitution) Order in Council 1962*, S.I. 1962/1550, *Second Schedule*, ss. 17(1), (2) [*Jamaican Constitution*].

⁶⁷ 948 F.2d 1473 (9th Cir. 1990).

⁶⁸ [1979–1980] S.L.R.(R.) 710. The Privy Council went on to hold that the word “law” in art. 9 incorporated the fundamental principles of natural justice in existence at the time when the *Constitution* was established, such as the presumption of innocence. Thus, it could be argued that any law that presumes a person found at the scene of a crime to be guilty of the crime would offend art. 9. Thus, the courts have not accepted the principle, as the academics might have suggested, that “law” in art. 9 of the *Constitution* means any law passed by the Parliament in accordance with the procedural requirements of the *Constitution*.

⁶⁹ See for instance, *Nguyen Tuong Van v. Public Prosecutor* [2005] 1 S.L.R.(R.) 103 at para. 82 (C.A.). The irony of this episode was that, in the aftermath of *Jabar*, *supra* note 61, the courts brought forward for trial all the pending capital cases. This resulted in an unusually large number of defendants being convicted and their sentences executed within the five-year time-frame set by *Pratt*, *supra* note 65. This

In truth, the courts have never shirked from exercising judicial review of the exercise of legislative and executive powers whenever issues of illegality of such nature are raised in court proceedings. The point is that courts do not proceed on the basis that Parliament is in the habit of legislating unconstitutionally or that the Executive is in the habit of acting unlawfully. I turn now to criticisms against the law on preventive detention without trial.

III. JUDICIAL REVIEW OF PREVENTIVE DETENTION CASES

Current legislation provides for three types of preventive detention, *viz.* the *Internal Security Act*,⁷⁰ the *Criminal Law (Temporary Provisions) Act*,⁷¹ and the *Misuse of Drugs Act*,⁷² all of which have been constitutionalised.⁷³ The *ISA* is concerned with national security, the *CLTP* with public order, and the *MDA* with rehabilitation of drug addicts. Preventive detention without trial is anathema to libertarian critics. Human rights proponents have routinely asserted that the *ISA* and the *CLTP* grant the Government:⁷⁴

“[V]irtually unlimited powers” to detain suspects without charge or judicial review using the *Internal Security Act* and the *Criminal Law (Temporary Provisions) Act*. These laws have been used to incarcerate outspoken activists for prolonged periods without trial, as well as criminal suspects who should be charged under the penal code. In dealing with terrorism suspects, the government should use the criminal code to prosecute in accordance with international due process standards.

The Government has always denied that the *ISA* has ever been used for political purposes.⁷⁵ A 1971 case is worth noting. In *Fernandez v. Government of Singapore*,⁷⁶ the Government sought to extradite Fernandez from the United Kingdom for corruption offences. Fernandez resisted on the ground that he might be detained for his political opinions which he had expressed against the Government as Secretary of Malaysia-Singapore Airlines Ltd.⁷⁷ The House of Lords (*per* Lord Diplock) rejected

led to human rights groups labelling Singapore as the death penalty capital of the world on a *per capita* basis. It was a case of “damned if you do, damned if you don’t”.

⁷⁰ Cap. 143, 1985 Rev. Ed. Sing. [*ISA*].

⁷¹ Cap. 67, 2000 Rev. Ed. Sing. [*CLTP*].

⁷² Cap. 185, 2008 Rev. Ed. Sing. [*MDA*].

⁷³ The *ISA* is sanctioned by art. 149 of the *Constitution*, and the *CLTP* and the *MDA* by arts. 9(6)(a) and (b) respectively of the *Constitution*.

⁷⁴ See “Singapore: Stop Hiding Behind Old Excuses” *Human Rights Watch* (24 January 2012) online: Human Rights Watch <<http://www.hrw.org/news/2012/01/23/singapore-stop-hiding-behind-old-excuses>> (last accessed 6 October 2012).

⁷⁵ The detention of Francis Seow under the *ISA* is usually cited to illustrate this accusation. The Government denies this accusation. It should be noted that Seow did not apply for judicial review of his detention.

⁷⁶ [1971] 1 W.L.R. 987 (H.L.).

⁷⁷ Section 4(1)(c) of the *Fugitive Offenders Act 1967*, (U.K.), 1967, c. 68 provided as follows [emphasis added]:

(1) A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, to the court of committal or to the High Court or High Court of Justiciary on an application for habeas corpus or for review of the order of committal—... (c) that he might, if returned, be prejudiced at his trial or punished, *detained* or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

this defence in these words:⁷⁸

I do not find it necessary to set out again the relevant evidence on the political aspect of the appellant's case. It is fully dealt with in the judgment of the Divisional Court.^[79] Apart from the appellant's own oral evidence which was disbelieved by the magistrate, all that has been proved is that since 1948 there has been emergency legislation in Singapore authorising the detention without trial of persons who are regarded as security risks, and that between 60 and 100 detainees are currently subject to detention thereunder. There is no evidence that anyone has been detained under this legislation merely because he has expressed political opposition to the Singapore Government such as that which the appellant claims to have expressed. Indeed such evidence as there is is to the contrary.

The *ISA* gives extensive, but not unlimited, powers to the Government to detain persons on national security, and not political, grounds. In *Chng Suan Tze*,⁸⁰ the Court of Appeal held that a detention order under the *ISA* was subject to judicial review and that in such a case, the court could decide for itself whether the detention order was in truth made in connection with national security. In other words, the President's satisfaction was subject to judicial review. If the allegations of fact in the detention order established that fact, the court would defer to the Executive's judgment to detain him as a threat to national security. Parliament did not agree with the law as formulated, and amended the *Constitution*⁸¹ to restore the law as decided in the case of *Lee Mau Seng v. Minister for Home Affairs*,⁸² that the President's decision would not be justiciable. The constitutional amendments expressly truncated judicial review regarding national security cases to this extent.⁸³ However, in so doing, Parliament implicitly recognised that all other kinds of executive acts (including detention orders made under the *CLTP*⁸⁴) are subject to full judicial review. Since then, the courts have applied the legality principle to, *inter alia*: (a) the Minister's decision under s. 16 of the *Newspaper and Printing Presses Act*⁸⁵ declaring a foreign newspaper as engaging in domestic politics;⁸⁶ (b) the exercise of the clemency power

⁷⁸ *Supra* note 76 at 993.

⁷⁹ *R. v. Governor of Pentonville Prison, ex parte Fernandez* [1971] 1 W.L.R. 459. The court observed thus (at 469):

Although preventive detention has existed in Singapore for many many years, although up to 60 or 100 people are in detention without trial at any one time, it is very significant that those who have been detained are not people who have merely exercised their freedom of speech, criticised the government in some way, voicing their dislike of preventive detention, voicing their dislike in respect, for instance, of this airline and the policy of the government. There is no evidence that people of that sort have ever been detained. Those who have been detained are avowed communists, in the majority, members of a splinter group of the P.A.P., representatives of [Barisan] and members of unions fighting against the industrial relations law. I can find no evidence to suggest that somebody critical, as the applicant may be, of P.A.P. is in any way a likely subject for preventive detention...

⁸⁰ *Supra* note 31.

⁸¹ *Constitution of the Republic of Singapore (Amendment) Act 1989* (No. 1 of 1989), s. 3(c).

⁸² [1971-1973] S.L.R.(R.) 135 (H.C.).

⁸³ See *Internal Security (Amendment) Act 1989* (No. 2 of 1989), in particular, s. 8B.

⁸⁴ Referring here to the edition then: *Criminal Law (Temporary Provisions) Act* (Cap. 67, 1985 Rev. Ed. Sing.).

⁸⁵ Then Cap. 206, 1985 Rev. Ed. Sing.

⁸⁶ *Dow Jones, supra* note 38.

of the President under art. 23 of the *Constitution*;⁸⁷ and (c) prosecutorial power under art. 35(8) of the *Constitution*.⁸⁸

The judicial power is part of the basic structure of the *Constitution* and its exercise through judicial review is the cornerstone of the 'rule of law'. It is the means by which the courts check illegality, whether of legislative or executive acts. In India, the Supreme Court held in *Kesavananda Bharati Sripadagalvaru v. State of Kerala* that judicial review is part of the basic structure of the *Indian Constitution* which cannot be taken away by Parliament as it was given by a constituent assembly and not Parliament ("the *Kesavananda* doctrine").⁸⁹ In *Teo Soh Lung v. Minister for Home Affairs*,⁹⁰ Justice F.A. Chua held that the *Kesavananda* doctrine was not applicable to the *Constitution* as it was given by Parliament. What Parliament gave, Parliament could take back. He also held the amendments complained of had not destroyed the basic structure of the *Constitution*. Justice Chua said:⁹¹

There is no abrogation of judicial power. It is erroneous to contend that the Rule of Law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review... Parliament has done no more than enact the rule of law relating to the law applicable to judicial review...

This ruling has been criticised on the ground that it "anaemically and formalistically stated that rule of law is the rule which Parliament stipulates".⁹² I think that this comment is unfair because Parliament did not simply make a new rule. It actually amended the *Constitution* to make that rule, and unless the amendments were declared unconstitutional, it must be followed. Justice Chua's rulings were followed by Justice Lai Kew Chai in *Cheng Vincent v. Minister for Home Affairs*.⁹³

As a result of these two rulings, the academics have stated that: (a) the Singapore courts have "effectively preclude[d] substantive review of ISA cases",⁹⁴ or (b) that "the Judiciary has abdicated its role as guardian of individual liberties and a check on state power."⁹⁵

But, Teo's appeal to the Court of Appeal was dismissed on the ground that she had failed to discharge the burden of proving that her re-detention was not based on national security considerations.⁹⁶ The court observed that the Government had declined to argue that the court was powerless to intervene if the detention was made for reasons which had nothing to do with national security. The Court of Appeal declined to decide whether Justice Chua was correct to hold that the *Kesavananda* doctrine was not applicable to any constitutional amendment of any nature.⁹⁷ That

⁸⁷ *Yong Vui Kong v. A.G.* [2011] 2 S.L.R. 1189 (C.A.).

⁸⁸ *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239 (H.C.); *Ramalingam Ravinthran v. A.G.* [2012] 2 S.L.R. 49 (C.A.).

⁸⁹ A.I.R. 1973 S.C. 1461.

⁹⁰ [1989] 1 S.L.R.(R.) 461 (H.C.).

⁹¹ *Ibid.* at para. 48.

⁹² Thio, "Rule of Law", *supra* note 4 at 207.

⁹³ [1990] 1 S.L.R.(R.) 38 (H.C.).

⁹⁴ Thio, "Rule of Law", *supra* note 4 at 208.

⁹⁵ Tey, "Judicial Internalising", *supra* note 35 at 301.

⁹⁶ *Teo Soh Lung* (C.A.), *supra* note 38 at paras. 34, 35, 41.

⁹⁷ *Ibid.* at para. 44. See the perceptive comments of Michael Hor, "Constitutionalism and Subversion—An Exploration" in Thio & Tan, *supra* note 16, 260 at 286, 287.

is the legal position today and academics may well have to revisit their analysis on this issue.

IV. FREE SPEECH—DEFAMATION AND CONTEMPT OF COURT

I will now discuss some cases on freedom of speech and expression. Critics of Singapore's human rights record have focused primarily on defamation and contempt of court actions against the foreign media and political opponents of the Government. They are more concerned with the outcomes rather than whether the law justified such outcomes.

A. Freedom of Speech

Constitutional protection of free speech is only given to citizens.⁹⁸ Article 14(1)(a) of the *Constitution* provides: "Subject to clauses (2) and (3), every citizen of Singapore has the right to freedom of speech and expression". Clause 2 provides that:⁹⁹

Parliament may by law impose—(a) on the rights conferred by clause (1)(a), *such restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence...

This provision is the same as the corresponding provision in the *Malaysian Constitution*¹⁰⁰ except that the latter uses the word "deems" and not "considers". One can argue that the word "considers" is stricter than "deems" in that it requires Parliament to first apply its mind to the necessity or expediency of the restriction.

To appreciate the full import of art. 14, reference may be made to the corresponding provisions in the *Constitution of the United States*¹⁰¹ and the *Indian Constitution*. The *First Amendment* to the *US Constitution* provides that "Congress shall make no law... abridging the freedom of speech, or of the press".¹⁰² Although the *First Amendment* prohibits Congress from making any law abridging freedom of speech, it did not say that the Supreme Court could not do so, and it has done so. Freedom of speech is not absolute.¹⁰³ Hence, in the U.S., how much freedom of speech is permitted to the people is determined ultimately by the U.S. Supreme Court.

⁹⁸ As non-citizens do not enjoy constitutional free speech, the Court of Appeal rejected the applicability of the *Reynolds* privilege (*infra*) as a defence to any defamatory statements made by a foreign publisher in the case of *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 S.L.R. 52. The Court found that the *Reynolds* privilege was a development of human rights jurisprudence under art. 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [ECHR] as a result of the U.K. joining the EU: see *Reynolds v. Times Newspapers Ltd* [2001] 2 A.C. 127 at 200 (H.L.) [*Reynolds*]. Accordingly, allowing the appellant to plead the *Reynolds* privilege would elevate their common law right of free speech to that based on a constitutional foundation, which would be contrary to art. 14.

⁹⁹ Emphasis added.

¹⁰⁰ *Malaysian Constitution*, art. 10(a).

¹⁰¹ U.S. Const. [*US Constitution*].

¹⁰² U.S. Const., amend. I. [*First Amendment*].

¹⁰³ That freedom of speech is not absolute but carries with it "duties and responsibilities" is also recognised in several international human rights conventions: see for instance art. 10(2) of the *ECHR*, *supra*

Article 19(1)(a) of the *Indian Constitution* provides that “all citizens shall have the right—(a) to freedom of expression”,¹⁰⁴ and art. 19(2) provides that:

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause... in relation to contempt of court, defamation or incitement to an offence.

Under art. 19(2), how much freedom of speech is permitted to the people is determined by existing law or by legislation “in so far as such law imposes reasonable restrictions on the exercise of [that] right... in relation to contempt of court, defamation or incitement to an offence”. What is “reasonable” is a question of law. Hence, in India, how much freedom of speech is permitted to the people is determined ultimately by the Indian Supreme Court.

Article 14(2) of the Singapore *Constitution*¹⁰⁵ is quite differently formulated. It does not say that the restrictions must be objectively reasonable or expedient. It is for Parliament to “consider” whether the restriction is necessary or expedient to protect the enumerated interests or values. This formulation was deliberate (as the corresponding Malaysian provision uses the word “deems”). Thus, the *Constitution* has vested Parliament, and not the courts, with the power to decide what is necessary or expedient to restrict the art. 14 constitutional rights. The test is not whether the court considers a restriction imposed by Parliament “necessary or expedient”, but whether Parliament *considers* it to be so. Unless there is evidence to show that Parliament has not considered, or perhaps took into account irrelevant considerations, there could be no legal basis for judicial review of the necessity or expediency of the restriction in question.¹⁰⁶

note 98 and art. 19 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.

¹⁰⁴ *Supra* note 27.

¹⁰⁵ *Supra* note 14.

¹⁰⁶ See also *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 S.L.R.(R.) 582 (H.C.) [*Chee Siok Chin*] where V.K. Rajah J., in considering the constitutionality of the *Miscellaneous Offence (Public Order and Nuisance) Act* (Cap. 184, 1997 Rev. Ed. Sing.) [MOA] under art. 14(2), held at para. 56 as follows:

Parliament has therefore considered and has intended through the MOA to impose restrictions on the freedom of speech and/or assembly that are “necessary or expedient” to ensure public order in certain situations. Accordingly, in my view, there can be no challenge as such to the constitutionality of the MOA.

The scope of art. 14 may be summarised as follows:

- (a) First, non-citizens do not have constitutional freedom of speech to engage in domestic affairs, and can be prohibited by ordinary law from doing so. How Singapore is governed is for Singaporeans to decide. The constitution framers knew what they were doing.
- (b) Second, the constitutional protections for citizens are subject to the restrictions set out therein.
- (c) Third, if Parliament enacts any law restricting these rights, it would be legally difficult, if not impossible to invalidate the law unless there is evidence that Parliament has not considered such restrictions to be “necessary or expedient”.
- (d) Fourth, personal and judicial reputations were protected at common law by the law of defamation and of contempt of court which were continued under art. 162, and later supplemented by legislation.
- (e) Fifth, the constitution framers gave preference to personal and judicial reputation over freedom of speech by allowing the latter right to be restricted by the former rights. In Western liberal democracies, free speech trumps all other rights, except perhaps the right to life (unless you take Voltaire seriously). However, the relative constitutional standing of freedom of speech and the

Critics have suggested that the courts' philosophy or practice is to defer to Parliament "on matters of social policy" and to accept Parliament "as having the sole authority to determine sensitive issues surrounding the scope of fundamental rights".¹⁰⁷ The criticism extends even to the Privy Council's decision in *Ong Ah Chuan* when it rejected the defence that the 15 g differentia for imposing the mandatory death penalty for trafficking in heroin was arbitrary, and therefore unconstitutional under art. 9 (the right to life clause) and art. 12 (the equality before the law clause). A concession is however made by the critics that while such deference is not objectionable *per se*, it "may undermine the doctrine of constitutional supremacy where the question involves the balancing of fundamental liberties."¹⁰⁸

The case of *Chee Soon Juan v. Public Prosecutor*¹⁰⁹ (where the appellant was convicted of the offence of holding a public rally without a licence in breach of the *Public Entertainments and Meetings Act*¹¹⁰) is cited as an example where constitutional supremacy was undermined. Here is what the authors wrote:¹¹¹

In dismissing the appeal, the court appeared to have assumed that Parliament had struck the right balance between the freedom of speech and expression as provided under Article 14(1)(a) and the restrictions under Article 14(2)(a). Article 14(2)(a) states that Parliament may by law impose such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence. The court did not consider whether the restrictions under PEMA [were] necessary or expedient, neither did it specifically consider which limb of Article 14(2)(a) was engaged. There was no judicial balancing, or exposition on the scope of Article 14(2)(a). Neither was there any consideration of the terms 'necessary or expedient'.

However, in a case decided in 2006, *viz. Chee Siok Chin*,¹¹² the High Court did provide a full analysis of the meaning of these words in art. 14(2)(a), but reference to this decision is relegated to a footnote in the same article which simply noted that "a generous interpretation was directed to the constitutional parliament intent to see whether a restrictive law fell within the terms of permissible constitutional derogation."¹¹³ What the authors omitted to mention is that the restrictive law referred to was also *PEMA*. This is not the only example of cherry-picking a "criticisable" court decision in order to criticise it when it has already been corrected by another decision. I shall give you another example later.

With these observations, I shall now discuss defamatory speech.

right to privacy under the *Human Rights Act 1998* (U.K.), c. 42 is not settled. The jurisprudence under the *ECHR*, *supra* note 98 appears to prefer privacy to free speech: see *Mosley v. News Group Newspapers Ltd* [2008] E.M.L.R. 20 (H.C.).

¹⁰⁷ Neo & Lee, *supra* note 20 at 176.

¹⁰⁸ *Ibid.*

¹⁰⁹ [2003] 2 S.L.R.(R.) 445 (H.C.).

¹¹⁰ Cap. 257, 2001 Rev. Ed. Sing. [*PEMA*].

¹¹¹ Neo & Lee, *supra* note 20 at 177.

¹¹² *Supra* note 106.

¹¹³ Neo & Lee, *supra* note 20 at 176, n. 130.

B. Defamatory Speech

The common criticism is that the courts have:¹¹⁴

[M]inimised the importance of free speech as an individual right and as a community interest in free, informed debate within a democratic society, promoting transparent, accountable government.

Another comment from a different perspective is that the courts, in rejecting the “public figure” test (which is unique to U.S. defamation law), have failed to balance the interest of free speech in a democratic society, especially political speech, against the right to personal and judicial reputation.

On my analysis of art. 14, the *Constitution* has already balanced the competing values—freedom of speech and expression is expressly made subject to the values of personal reputation and judicial reputation and authority. The court is not entitled to disregard the constitutional preference, and arrogate to itself the power to “re-balance” these competing values. This would be contrary to the ‘rule of law’. In any action for defamation, whoever the defendant may be, the court is only concerned with whether the words complained of are defamatory or not, or whether there is a defence in law. Similarly, in a prosecution for criminal contempt for scandalising the court, the court is only concerned with whether the words or conduct complained did scandalise the court. The issue before the court is no longer a constitutional law issue, but a civil and criminal law issue.

The common law treats all defendants as equal—there has never been a “public figure” defence, and it would be wrong for the court to change the law by giving such a defendant more defences than any other defendant. Defaming a politician is not necessarily political speech, and political speech does not need to be defamatory. In the last two general elections, all the Members of Parliament were elected without having made any defamatory statements against their political opponents.

The courts have also been criticised for inflicting a “double whammy” on defendants, *i.e.* although the courts rejected the “public figure” defence, they have at the same time awarded high damages to such public figures, as compared with ordinary plaintiffs. But critics should bear in mind that the same principles would continue to apply if opposition politicians were to become Ministers of the Government and were defamed by their political opponents. The law applies equally to all politicians, whichever side of the House they may be sitting.

I shall now discuss the contempt of court cases.

C. Contempt of Court

The law of contempt of court for scandalising the courts is based on the common law. It has also been criticised for privileging judicial reputation against freedom of speech. The courts are criticised for using the law to stifle legitimate criticism of their decisions. These criticisms are misconceived. There is freedom of speech at common law, but it ends where contempt of court begins. Article 14 has done no more than to constitutionalise this position. The makers of the *Constitution* took the view

¹¹⁴ Thio, “Rule of Law” *supra* note 4 at 198.

that speech or conduct which scandalises the court merely undermines confidence in the authority of the courts to administer justice. It serves no legitimate social purpose.¹¹⁵

The courts have also been criticised for wrongly applying the “inherent tendency” test¹¹⁶ rather than the “real risk” test, the former being more favourable to the courts, since 1991. In 2010 in *A.G. v. Shadrake*,¹¹⁷ Justice Quentin Loh, after reviewing all the previous decisions, held: (a) that the 1991 case did not apply the “inherent tendency” test; (b) that the test was not established law in Singapore; (c) that it was not the correct test; (d) that he was not bound by previous decisions applying or approving the test; and (e) that the “real risk” test was the correct test. These rulings were affirmed on appeal by the Court of Appeal.¹¹⁸

But, surprisingly, two articles published in foreign law journals in 2010 and 2011 respectively continue to castigate the courts for applying the “inherent tendency” test. The 2010 article which was post-*Shadrake* (H.C.), mentioned the decision in a footnote without stating what it decided.¹¹⁹ The 2011 article which was post-*Shadrake* (C.A.) omitted mention of *Shadrake* altogether.¹²⁰ This approach suggests that some critics continue to look for “criticisable” decisions to criticise even though they no longer represent the current law.

Whilst damages for defamation of Government Ministers have been criticised for their “chilling” effect on free speech, the critics have said nothing about the penalties imposed for contempt of court. They were not substantial in comparison. Dow Jones Inc for instance was fined \$4,000 in one case but re-offended and then fined \$25,000.¹²¹ *Shadrake* was sentenced to six weeks’ imprisonment and fined only \$20,000, the heaviest punishment ever imposed by the court, because his contempt was the most egregious to date.¹²²

Finally, I want to discuss the case of *Lingle*¹²³ because of the manner in which it has been criticised. Lingle was a Senior Fellow in the European Studies Program at the National University of Singapore. He wrote an article captioned “The Smoke Over Parts of Asia Obscures Some Profound Concerns”¹²⁴ in response to an article written by Kishore Mahbubani, “You May Not Like It Europe, but This Asian

¹¹⁵ See *A.G. v. Tan Liang Joo John* [2009] 2 S.L.R.(R.) 1132 (H.C.).

¹¹⁶ Beginning with *A.G. v. Wain Barry J* [1991] 1 S.L.R.(R.) 85 at para. 54 (H.C.).

¹¹⁷ [2011] 2 S.L.R. 445 (H.C.) [*Shadrake* (H.C.)].

¹¹⁸ *Shadrake Alan v. A.G.* [2011] 3 S.L.R. 778 (C.A.) [*Shadrake* (C.A.)].

¹¹⁹ See Tsun Hang Tey, “Criminalising Critique of the Singapore Judiciary” (2010) 40 Hong Kong L.J. 751 at n. 16 [Tey, “Criminalising Critique”].

¹²⁰ Tey Tsun Hang Tey, “Contempt of Court Singapore-style: Contemptuous of Critique” (2011) 40 C. L. World Rev. 235 [Tey, “Contempt of Court”].

¹²¹ In *A.G. v. Wain Barry J* [1991] 1 S.L.R.(R.) 108 (H.C.), the editor was fined \$4,000, the publisher \$1,000 and Dow Jones Inc, the owner, \$4,000. In another contempt case in 2009, *A.G. v. Hertzberg Daniel* [2009] 1 S.L.R.(R.) 1103, Dow Jones was fined \$25,000 because it was a repeat offender.

¹²² Recently, the English High Court sentenced a juror who revealed to fellow members of the jury that the accused was previously accused of rape to six months’ imprisonment on the ground that it could threaten the survival of the jury system, a precious institution of the British criminal justice system: see *A.G. v. Dallas* [2012] EWHC 156 (Admin). The BBC report on this case is available online: “Juror Theodora Dallas jailed for contempt of court” *BBC* (23 January 2012), online: BBC <<http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-16676871>> (last accessed 6 October 2012).

¹²³ *Supra* note 54.

¹²⁴ *International Herald Tribune* (7 October 1994), online: International Herald Tribune <<http://www.nytimes.com/1994/10/07/opinion/07iht-chis.html>>.

Medicine Could Help”¹²⁵ on the political landscape in Europe. Both articles were published in the *International Herald Tribune*. Lingle wrote, *inter alia*:¹²⁶

Intolerant regimes in the region reveal considerable ingenuity in their methods of suppressing dissent. Some techniques lack finesse; crushing unarmed students with tanks or imprisoning dissidents. *Others are more subtle; relying upon a compliant judiciary to bankrupt opposition politicians, or buying out enough of the opposition to take control 'democratically'.*

In spite of the smoke used to obscure the identity of the alleged compliant judiciary, the Attorney-General cited Lingle, the newspaper's editor, the publisher and Chief Executive and the distributors and printers for contempt of court. Lingle left Singapore and did not defend the case. The newspaper and its editor accepted that the words “compliant judiciary” scandalised the courts. However, they denied that those words referred to the Singapore courts. The Attorney-General filed an affidavit setting out his research which showed that the only Asian country where opposition politicians had been made bankrupt by the government ministers was Singapore. In his police statements, Lingle denied that he referred to Singapore, but refused to identify the country he was referring to. The newspaper's Asia editor testified that the words “compliant judiciary” were not intended to refer to Singapore. Under cross-examination, he was asked which “intolerant regime relied on a compliant judiciary to bankrupt opposition politicians” and he replied that he thought it was the Marcos regime.¹²⁷ It was such a bizarre reply for an editor of an international newspaper reporting on political issues in the region (because Marcos would not have bothered to sue his political opponents in court).

One point in this defence should be highlighted. One academic has written that “[i]n *AG v. Lingle*, the AG adduced evidence that between 1971 and 1993 ‘there had been 11 cases of opposition politicians who had been made bankrupt after being sued’”,¹²⁸ as if to suggest that the Attorney-General had shot himself in the foot by adducing such evidence. In fact, the evidence was produced to show that the courts decided the cases on their merits. The evidence showed that (a) in a large number of cases, judgments were entered in default of appearance or defence; (b) in one case, Joshua Benjamin Jeyaretnam sued Goh Chok Tong for defamation, and succeeded in the High Court, but was reversed by the Court of Appeal on the ground that the words complained of were fair comment and this decision was upheld by the Privy Council; and (c) in the other cases, the defendants were found liable because the words complained of were defamatory in law. Counsel for the newspaper accepted the thrust of the evidence, and adroitly tried to turn it on its head to argue that since the Attorney-General had shown that the courts were not compliant, therefore Lingle's words could not have been intended to refer to Singapore!

¹²⁵ *International Herald Tribune* (1 October 1994), online: International Herald Tribune <<http://www.nytimes.com/1994/10/01/opinion/01iht-mah.html>>.

¹²⁶ *Supra* note 124 [emphasis added]. Note that the original quoted text has since been altered in the International Herald Tribune's archive of this article. See *Lingle*, *supra* note 54 at para. 3 for the original text.

¹²⁷ *Lingle*, *ibid.* at para. 45.

¹²⁸ Thio “Rule of Law” *supra* note 4 at 189.

In the 2010 article I have referred earlier, the critic wrote these comments (which were repeated in the 2011 article):¹²⁹

[Lingle] illustrates the great extent to which the court went in making inferences of contempt by way of publications which allegedly scandalised the judiciary.

...

Goh J readily accepted the Attorney-General's submission that 'although the article did not refer to any specific country, the words "*relying upon a compliant judiciary to bankrupt opposition politicians*" when read in the context of the article, were intended, and did refer, or would be easily understood to refer, to Singapore'.

Both statements are unwarranted. First, Lingle's article did scandalise the Judiciary, as even the International Herald Tribune agreed. Second, the evidence proved beyond any doubt that the "compliant judiciary" was the Singapore courts. To assert that Justice Goh readily accepted the Attorney-General's submission is close to saying that the judge was compliant.

There are other academic criticisms which time does not permit me to comment on. You may ask: should I bother with them? I have three reasons: first, I respect academics and their views and in fact we have referred to academic opinions in our judgments. Second, careless and biased criticisms, especially when published in foreign journals, may give legitimacy to other equally careless and biased views of others with different agendas. Third, and more importantly, generations of law students may also be influenced by such views. Two years ago, I discovered that many of our law students believed that judicial review in Singapore is discouraged by the courts. I had to give a lecture to law students from the Singapore Management University to dispel this myth, with facts and figures to show a reasonably high rate of success against public authorities. I am not sure I have succeeded.¹³⁰

V. CONCLUSION

In 2008, Mr. Tony Blair, the former Prime Minister of the U.K., delivered a lecture entitled "Upholding the Rule of Law—A Reflection" in which he said, *inter alia*:¹³¹

In today's world, obedience to the Rule of Law is not just right in itself; it is an important part of creating a successful country. In today's world, it is a vital component of economic success. In today's world, it is integral to a well-functioning society.

I believe adherence to the Rule of Law applies in all circumstances and at all stages of development. Perhaps, before saying why, I should explain what I understand by the Rule of Law.

To me, it means the following. It means an independent judiciary, one that is independent of government and not dependent on it or subservient to it. Unless

¹²⁹ Tey, "Contempt of Court", *supra* note 120 at 247, 248 [emphasis in original, footnotes omitted]. Note that only the second paragraph cited above was repeated from the earlier 2010 article: see Tey, "Criminalising Critique", *supra* note 119 at 769.

¹³⁰ See Chan Sek Keong, "Judicial Review—From Angst to Empathy" (2010) 22 Sing. Ac. L.J. 469.

¹³¹ See Visu Sinnadurai, ed., *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition* (Petaling Jaya: Thomson Reuters Malaysia, 2011) at 353.

the public accepts that the judiciary are independent, they will have no confidence in the honesty and fairness of the decisions of the courts. This independence is exemplified in the judicial oath.¹³²

I certainly agree with what Mr. Blair said. If he were looking for a 'rule of law' model state to support his thesis, he might want to look at Singapore. I am aware this may be heresy to some commentators. One of the greatest global challenges today is how to provide good government to people all over the world. It is the role of the Judiciary which claims the ultimate capacity to decide what the law is and to apply the law impartially and equally to all.¹³³ No powers are above the law and no person or institution is beyond the reach of the courts. The Judiciary has the duty to check all unlawful legislative or executive acts, but it also has the responsibility not to interfere with or obstruct the lawful policies of an elected government. This takes courage and wisdom on the part of each judge personally and the Judiciary as an institution. It is only by so doing that the Judiciary upholds the 'rule of law' in the interest of good government and the welfare and happiness of the people.

¹³² The oath of the Chief Justice, the Judges and Judicial Commissioners of the Supreme Court of Singapore, as stated in the *First Schedule* to the *Constitution*, *supra* note 14, s. 6, is as follows:

I, [*name*], having been appointed to the office of [*position*], do solemnly swear (or affirm) that I will faithfully discharge my judicial duties, and I will do right to all manner of people after the laws and usages of the Republic of Singapore without fear or favour, affection or ill-will to the best of my ability, and will preserve, protect and defend the Constitution of the Republic of Singapore.

¹³³ See Gleeson, *supra* note 22.