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FULL POWERS AND THE CONSTITUTIONAL DOCTRINE OF IMPLIED AMENDMENTS

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This article makes the case for the applicability of the doctrine of implied amendments to the Constitution of Singapore. The first part of this article tracks the origins and judicial development of the doctrine of implied amendments across the common law jurisdictions of Australia, Sri Lanka and Jamaica. The second part analyses whether the doctrine of implied amendments is applicable within the constitutional paradigm of Singapore based on a plain, textualist approach towards the Singapore Constitution. It also evaluates and analyses the historical academic and judicial treatment of the doctrine in Singapore, if any. The final part explores the normative justifications for adopting the doctrine of implied amendments, namely that it upholds the 'flexible constitutionalism' that characterises Singapore's constitutional system, and best weds the legal nature of the Westminster system of parliamentary democracy and sovereignty to the concept of a legal system predicated on constitutional supremacy.

I. INTRODUCTION

Within the field of constitutional law and theory, few doctrines have remained as controversial and yet obscure as the doctrine of implied amendments to a constitution. Without putting too fine a point to it, the gist of the doctrine of implied amendments is essentially that a constitution may be amended through legislation that is not expressly titled as legislation for the amendment of said constitution (*ie by implication*), so long as the procedural requirements for constitutional amendment are met. And yet, despite the apparent controversy that the doctrine poses, it is striking that the doctrine of implied amendments has generally failed to elicit any significant attention from academics and legal professionals alike. What academic commentary there exists on the subject matter has tended to avoid reaching any definitive conclusion on the applicability of the doctrine within Singapore law, with most works acknowledging the existence of the doctrine of implied amendments in and of itself, while remaining content to leave the doctrine's definitive status within the broader legal landscape of Singapore constitutional law an open question.[1]

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1 For a recent example, see Kevin Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 3d ed (Singapore: LexisNexis, 2010) at 148-153; Kevin Tan, *The Constitution of Singapore: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 48, 49; see also *Halsbury's Laws of Singapore*, vol 1, 2017 Reissue (Singapore: LexisNexis, 2017) [*Halsbury's Singapore*] at para 10.507.

Admittedly, it would be woefully inaccurate to attribute much of the latent ambiguity surrounding the doctrine of implied amendments to the academics' own making, for much of the present controversy stems from the simple fact that no case has yet emerged in Singapore where the doctrine was the subject of any serious judicial scrutiny. Furthermore, a most convenient and practical solution to the issue of implied amendments to the Constitution of Singapore[2] in the form of the 1966 Constitutional Commission's recommendations[3] was not adopted by the Government[4] and thus never incorporated into the *Singapore Constitution*, thus leaving open the possibility that the doctrine of implied amendments could still operate within the framework of the *Singapore Constitution*.

This article thus proposes to cleave through the Gordian knot posed by the doctrine of implied amendments by addressing the fundamental issue as to whether the doctrine can, and should, apply to the *Singapore Constitution*. The article will first track the development and gradual evolution of the doctrine of implied amendments across the Commonwealth countries in order to better thresh out the fundamental tenets of the doctrine itself. The article will next consider the reception of the doctrine of implied amendments in Singapore and will also address the various arguments militating in favour of or against the doctrine's existence in Singapore. Finally, the article will make the case for the continued relevancy of the doctrine of implied amendments within Singapore's constitutional law on the basis that it best upholds the 'flexible constitutionalism' that characterises the Singapore constitutional system, and marries the full powers of the Westminster Parliamentary system with the principle of constitutional supremacy. In addition, the article will contend that recognition of the doctrine's existence and applicability to the Singaporean legal landscape may, paradoxically, serve to pre-empt future efforts at amending the *Singapore Constitution* by implication.

II. The Judicial Development of The Doctrine of Implied Amendments Across the Commonwealth

A. *McCawley v R*

The Australian case of *McCawley v R*[5] is usually taken to be the starting point for the doctrine of implied constitutional amendments. That case concerned an appeal by the Appellant, one Thomas William McCawley, to the Privy Council against a decision[6] of the High Court of Australia in refusing to confirm the validity of the former's appointment as a judge of the Supreme Court of Queensland under the *Industrial Arbitration Act*.[7] Section 6 of that Act provided for the establishment of a Court of Industrial Arbitration and authorised the Governor in Council "to appoint

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

3 Report of the Constitutional Commission 1966 (Cmd 29 of 1966, 21 December 1966) [*1966 Constitutional Commission*] at para 76.

4 *Parliamentary Debates Singapore: Official Report*, vol 25 at cols 1051-1058 (21 December 1966) (E W Barker, Minister for Law and National Development).

5 [1920] 1 AC 691 [*McCawley*].

6 *McCawley v R* [1918] HCA 55, 26 CLR 9.

7 *Industrial Arbitration Act 1916* (Qld) [*Industrial Arbitration Act*].

a judge of judges of the Court not exceeding three in number".[8] Section 6(6) of the *Industrial Arbitration Act* in particular permitted the Governor to appoint any of the judges of the Court of Industrial Arbitration to be a judge of the Supreme Court in addition, with all the "rights, privileges, powers and jurisdiction conferred by this Act".[9] It was under this particular proviso that the Appellant was appointed first as President of the Court of Industrial Arbitration in 12 January 1917, followed by his appointment as a judge of the Queensland Supreme Court on 12 October 1917.[10]

At the heart of the matter was whether or not the provisions of the *Industrial Arbitration Act*, in particular section 6(6) of the Act, were *ultra vires* the Queensland Constitution,[11] and thus void. The Respondent contended that the provisions were indeed contrary to the *Queensland Constitution*, and, in the absence of any alterations either to the *Industrial Arbitration Act*, to ensure compliance with the *Queensland Constitution*, or to the *Queensland Constitution* itself to obviate any inconsistency between it and the *Industrial Arbitration Act*, the *Industrial Arbitration Act* was *pro tanto* void. The gist of the Respondent's arguments, as observed by the Privy Council, was that the *Queensland Constitution* was a "controlled" constitution, and thus could not be altered simply by the passage of inconsistent legislation.

The Privy Council rejected these arguments. Lord Birkenhead LC, on behalf of the Board, held that the *Queensland Constitution* could not be said to be a "controlled constitution", since it did not prescribe any particular restriction on the Queensland Parliament's power to make any laws.[12] On the contrary, section 2 of the *Queensland Constitution* specifically states that the Queensland Parliament had power:

> [T]o make laws for the peace welfare and good government of the colony in all cases whatsoever Provided that all Bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the legislative Assembly of the said colony.[13]

Lord Birkenhead's analysis was further reinforced by his observation that the Queensland Parliament's broad legislative power was in turn derived from the Order in Council of 6 June 1859, empowering the Governor of Queensland to make laws, and to provide for the Administration of Justice in the said Colony.[14] Clause 2 of that Order was virtually *in pari materia* with section 2 of the *Queensland Constitution* in that it also states that "within the said Colony of Queensland, Her Majesty shall have power, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, welfare, and good government of the Colony, in all cases whatsoever".[15] Lord Birkenhead took these provisions as evidence of the

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8 *Ibid* at s 6.

9 *Ibid* at s 6(6).

10 See *McCawley*, *supra* note 5 at 695-700 for a factual and legal background of the case.

11 *Constitution Act 1867* (Qld) [*Queensland Constitution*].

12 *McCawley*, *supra* note 5 at 714.

13 *Queensland Constitution*, *supra* note 11 at s 2; see also *McCawley*, *ibid* at 712.

14 *McCawley*, *ibid* at 707, 708, 711, 712.

15 *Order in Council empowering the Governor of Queensland to make Laws, and to provide for the Administration of Justice in the said Colony* (6 June 1859) at cl 2; see also *McCawley*, *ibid* at 706.

Imperial intention to confer wide and extensive legislative powers onto the Queensland colonial authority to make any laws necessary for the proper governance of the colony.

Lord Birkenhead recognised that the *Queensland Constitution* did contain an express restriction on Parliament's legislative power in section 9 of the *Constitution Act* but that section dealt chiefly with legislation affecting the constitution of the Queensland Parliament.[16] In the absence of any other express restriction or any specific amendment procedure affecting any other provision within the language of the *Queensland Constitution*, the Queensland Parliament must have been presumed to have full powers to amend the *Queensland Constitution* through ordinary legislation by way of bare majority except in the event such legislation fell within the ambit of the express restrictions contained in the *Queensland Constitution*. As Lord Birkenhead would go on to observe in his famous passage within the judgment:

> [T]he Act of 1867 has no such character as it has been attempted to give it. The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.[17]

Because the provisions of the *Industrial Arbitration Act* were *prima facie* inconsistent with the terms of the *Queensland Constitution*, they were deemed to have constituted an implied amendment of the *Queensland Constitution*'s provisions that dealt with the appointment and tenure of office for judicial officers in Queensland, and were thus not *ultra vires* the *Queensland Constitution*.[18]

B. *Bribery Commissioners v Ranasinghe*

The next decision that touched on the doctrine of implied amendments to a constitution arose in *Bribery Commissioner v Ranasinghe*.[19] This case, which was also heard by the Privy Council, concerned an appeal by the Bribery Commissioner of Ceylon against a decision of the Supreme Court of Ceylon quashing the Respondent's conviction for a bribery offence by the Bribery Tribunal on the basis that the persons comprising the Bribery Tribunal had not been lawfully appointed to the tribunal and thus had unlawfully exercised judicial powers in convicting the Respondent.[20]

Much like *McCawley*, the crux of the dispute concerned the validity of ordinary legislation that was, on the face of it, inconsistent with the constitution of the relevant

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16 *Queensland Constitution*, *supra* note 11 at s 9; see also *McCawley*, *ibid* at 712.

17 *McCawley*, *supra* note 5 at 714.

18 *Ibid*. Interestingly, Carney interprets the decision in *McCawley* as embodying the principle that "within the imperial constraints on their power, the State parliaments enjoy a limited form of parliamentary sovereignty comparable to that which Dicey identified as enjoyed by the Imperial Parliament": see Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (New York: Cambridge University Press, 2006) at 106.

19 [1965] 1 AC 172 [*Bribery Commissioner*].

20 *Ibid* at 192, 193.

jurisdiction. In *Bribery Commissioner*, this was the 1958 *Bribery Amendment Act*[21] which purported to amend the existing *Bribery Act*[22] by introducing new Bribery Tribunals, as well as creating the new office of Bribery Commissioner. The Ceylonese Supreme Court, which the Privy Council agreed with, considered that the relevant sections of the *Bribery Amendment Act* that purported to establish Bribery Tribunals were in conflict with section 55 of the *Ceylon (Constitution) Order in Council, 1946*.[23] Section 55 expressly vests the appointment of lower-ranked judicial officers with a Judicial Service Commission.[24] This being the case, the Ceylonese Supreme Court considered that the impugned sections of the *Bribery Amendment Act* were inconsistent with the *Ceylon Constitution* and thus void.[25]

In rejecting the appeal by the Appellant Bribery Commissioner, the Privy Council held that the *Bribery Amendment Act* as a whole had not been passed in accordance with the correct procedure for constitutional amendments under section 29(4) of the *Ceylon Constitution*, thereby rendering it procedurally invalid.[26] Section 29(4) of the *Ceylon Constitution* required that any Bill for the amendment or repeal of any of the sections of the *Ceylon Constitution* could not be validly passed "unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present)".[27] The *Bribery Amendment Act* contained no such certificate when it had been passed by the Ceylonese Legislature and subsequently received Royal Assent, and accordingly, it could not be treated as an amendment to the *Ceylon Constitution*, even if its practical effect was to alter the existing constitutional provisions dealing with the appointment of certain judicial officers in Ceylon.[28]

The Privy Council further took the opportunity to distinguish the present case from *McCawley*, which the Appellant had cited in its arguments before the Court. After extensively quoting from that judgment with approval, the Privy Council laid down the following proposition tying both *McCawley*'s case and *Bribery Commissioner* together:

> It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond

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21 *Bribery (Amendment) Act, 1958* (No 40 of 1958) (Ceylon) [*Bribery Amendment Act*].

22 *Bribery Act, 1954* (No 11 of 1954) (Ceylon) [*Bribery Act*].

23 *Ceylon (Constitution) Order in Council, 1946* at s 55 [*Ceylon Constitution*].

24 By contrast, the *Bribery Amendment Act* authorised the Governor-General, on the advice of the Minister of Justice, to appoint the members of the Bribery Tribunals. If these members were judicial officers, as the Supreme Court of Ceylon and the Privy Council so held, then their appointments would have to be determined by the Judicial Service Commission and not by the Governor-General: see *Bribery Amendment Act*, *supra* note 21 at s 41.

25 *P Ranasinghe v The Bribery Commissioner* (1962) 64 NLR 449 at 451, 454.

26 *Bribery Commissioner*, *supra* note 19 at 194-196.

27 *Ceylon Constitution*, *supra* note 23 at s 29(4).

28 *Bribery Commissioner*, *supra* note 19 at 199, 200.

> change nor so constructed as to require any special legislative process to pass upon the topic dealt with. *In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers.* Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result.[29]

Of significance is the fact that the Privy Council was prepared to recognise that amendments to the *Ceylon Constitution* could be made in the form of ordinary legislation, provided that such legislation had been passed in accordance with the prescribed constitutional amendment procedure. Since the *Bribery Amendment Act* had not been passed in accordance with the procedure contained in section 29(4) of the *Ceylon Constitution*, it was thus void for inconsistency with the *Ceylon Constitution*.[30]

C. *Kariapper v Wijesinha*

Bribery Commissioner was followed shortly by *Kariapper v Wijesinha*,[31] which was another appeal to the Privy Council from Ceylon. In *Kariapper*, the Appellant was a Member of Parliament who had his parliamentary seat vacated by the passing of the *Civic Disabilities Act*.[32] He had applied for *mandamus* to the Ceylonese courts against the Respondents requiring that they recognise his continued membership of the Ceylon Parliament and pay him his remuneration and allowances as a Member.

The Appellant, Kariapper, argued that the *Civic Disabilities Act* was inconsistent with the *Ceylon Constitution*,[33] and that even if it had purportedly been enacted as an amendment to the *Ceylon Constitution*, it was not an effective amendment for several reasons, the most pertinent one for the purposes of this discussion being that the Act in question was not an express amendment of the *Ceylon Constitution*.[34]

Sir Douglas Menzies, who delivered the judgement on behalf of the Privy Council, dismissed the appeal on the basis that the *Civic Disabilties Act* had been enacted in accordance with the amendment procedure in section 29(4) of the *Ceylon*

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29 *Ibid* at 198 [emphasis added].

30 *Ibid* at 199, 200.

31 [1968] 1 AC 717 [*Kariapper*].

32 *Imposition of Civic Disabilities (Special Provisions) Act, 1965* (No 14 of 1965) (Ceylon) [*Civic Disabilities Act*]. The Act provided for the imposition of certain disabilities and penalties against certain individuals, one of whom was the Appellant, who had been proven to have engaged in acts of bribery: see *ibid* at 730, n 31.

33 *Kariapper*, *ibid* at 731.

34 *Ibid*.

Constitution, thereby rendering it a valid amendment.[35] The Act did have endorsed upon it the requisite certificate under the hand of the Speaker that the number of votes cast in favour of the Bill in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House.[36] Crucially, the Board observed that it was immaterial that the *Civic Disabilities Act* was not an express amendment of the *Ceylon Constitution*.[37] The Board justified this with reference to *McCawley*'s case by first recognising the difference between the factual context in *McCawley* and *Kariapper*:

> As long ago as 1920 the judicial committee in *McCawley v. The King* decided that an uncontrolled Constitution could like any other Act of Parliament be altered simply by the enactment of inconsistent legislation. . . The power of the Parliament of Ceylon to amend or repeal the provisions of the Constitution is restricted in the manner provided by section 29. There is, therefore, a most material distinction between the Constitution of Ceylon and that of Queensland. . .[38]

However, the Privy Council further observed that, as in *McCawley*, the passing of inconsistent legislation by a jurisdiction's legislature could constitute an amendment to the constitution of that jurisdiction, regardless of whether it was a "controlled" or "uncontrolled" constitution:

> Although this passage has no bearing upon the ultimate question here, i.e., whether the manner and form required by section 29 for a constitutional amendment were actually observed, it has an important bearing upon the question to which a good deal of argument was addressed, namely, whether an inconsistent law should be regarded as an amendment of a controlled constitution in the absence of an expressed intention to amend. *The expression of opinion of the law officers concurred with by the board is that, as a general rule, an inconsistent law amends*. This is, of course, but an instance of the fundamental principle that it is from its operation that the intention of a statute is to be gathered. . . Accordingly, therefore, upon general principles and with the guidance of earlier authority their Lordships have come to the conclusions that the Act, inconsistent as it is with the Constitution of Ceylon, is to be regarded as amending that Constitution unless there is to be found in the constitutional restrictions imposed on the power of amendment some provision which denies its constitutional effect.[39]

Having accepted that the *Civic Disabilities Act* amounted to a constitutional amendment, the Privy Council subsequently rejected the Appellant's contention that the *Civic Disabilities Act* could not be taken to be a constitutional amendment because it did not expressly state that it was an Act to amend or alter the *Ceylon Constitution*. It is necessary here to quote the relevant extract from Sir Douglas Menzies's judgment

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35 *Ibid* at 739.
36 *Ibid*.
37 *Ibid* at 742-744.
38 *Ibid* at 739.
39 *Ibid* at 741 [emphasis added].

in full:

> As has already been explained, their Lordships do read the words 'amend or repeal' in the earlier part of section 29(4) as covering an amendment or repeal by inconsistent enactment. Indeed were these words 'amend or repeal' not to be regarded as covering an alteration by implication it might be that a law effecting such an alteration could be enacted under section 29(1) without any restriction arising from subsection (4). *Their Lordships however do not so read the statutory provisions and have to doubt that the Parliament of Ceylon has not uncontrolled power to pass laws inconsistent with the Constitution. Apart from the proviso to subsection (4) therefore the board has found no reason for not construing the words 'amend or repeal' in the earlier part of section 29(4) as extending to amendment or repeal by inconsistent law. Attention was, however, directed to the words in the proviso 'bill for the amendment or repeal' and it was argued that only a bill which provided expressly for the amendment or repeal of some provision of the order would fall within these words. Their Lordships would find it difficult to restrict the plain words of the earlier part of the subsection by reference to an ambiguity in the proviso, if one were to be found, but they find no ambiguity and they reject the limitation which it has been sought to introduce into the proviso. A bill which, if it becomes an Act, does amend or repeal some provision of the order is a bill 'for the amendment or repeal of a provision of the order.'* It would have been inexact to refer in the proviso to a bill to amend or repeal a provision of the order, but a bill which when passed becomes an amending Act falls exactly within the description under consideration. The bill which became the Act was a bill for the amendment of section 24 of the Constitution simply because its terms were inconsistent with that section.[40]

In summation, the Privy Council held that a constitutional amendment could take the form of ordinary legislation that was not expressly intituled to be legislation for the amendment or repeal of the constitution. As long as such ordinary legislation had been passed in accordance with the amendment procedures as prescribed in the constitutional text, in this case the *Civil Disabilities Act*, and had been passed bearing the relevant certificate from the Speaker of Parliament, then it would be treated as a valid amendment to the constitution. This was the essence of what has come to be known as the doctrine of implied amendments.

D. *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett*

After the decision in *Kariapper*, it appears that the doctrine of implied amendments had entered into a stage of relative dormancy, with little to no cases emerging that centred on the issue of implied constitutional amendments. This purported dormancy was, however, shattered when in 2005, the Privy Council was called upon to decide a similar constitutional dispute in the case of *Independent Jamaica Council for Human*

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[40] *Ibid* at 743 [emphasis added].

Rights (1998) Ltd v Marshall-Burnett,[41] illustrating that the doctrine of implied amendments had lost none of its relevancy.

The facts of that case may be briefly summarised: in *Independent Jamaica Council*, the Appellants sought to challenge the validity of legislation that had been enacted by the Jamaican Parliament for the purpose of abolishing appeals to the Privy Council while establishing the Caribbean Court of Justice as the final court of appeal for the Caribbean region.[42] The Appellants contended that, as the impugned statutes had the cumulative effect of altering certain entrenched provisions within the Jamaican Constitution[43] concerning the independence of the higher judiciary, they ought to have been passed in accordance with the prescribed amendment procedure for altering these entrenched provisions. This having not been done, the impugned statutes were thus inconsistent with the *Jamaican Constitution* and void.[44]

The Privy Council ruled in favour of the Appellants. Although their decision was arguably decided on a narrow procedural ground, namely that the three statutes had not been passed through the appropriate constitutional amendment procedure,[45] the judgment is significant for the Privy Council's reasoning that the doctrine of implied amendments applied to the *Jamaican Constitution* as well:

> It is clear, in the opinion of the Board, that the present question must be approached as one of substance, not of form, and the approach commended by Lord Diplock in *Hinds* [1977] AC 195, 211-214 is that which should be followed. It is noteworthy that in section 49(9)(b) of the Constitution 'alter' is defined to include 'amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to'. The Board would accept, as was held in *Kariapper v Wijesinha* [1968] AC 717, 743, that the words 'amend or repeal' cover an alteration by implication.[46]

Clearly, the doctrine of implied amendments was very much capable of being applied in the Jamaican context even though the Privy Council did previously acknowledge that in Jamaica "the Constitution and not, as in the United Kingdom, Parliament is... to be sovereign".[47] What is also noteworthy, and which will be of relevance in our discussion below, is that the *Jamaican Constitution*, much like the *Singapore Constitution*, possesses a constitutional supremacy clause[48] that is almost *in pari materia* with Singapore's constitutional supremacy clause.[49]

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41 [2005] 2 AC 356 [*Independent Jamaica Council*].

42 *Ibid* at para 1.

43 *Jamaica (Constitution) Order in Council 1962*, SI 1962/1550 [*Jamaican Constitution*].

44 *Independent Jamaica Council*, *supra* note 41 at para 16.

45 *Ibid* at para 24.

46 *Ibid* at para 19.

47 *Ibid* at para 9.

48 See *Jamaican Constitution*, *supra* note 43 at s 2: "Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

49 See *Singapore Constitution*, *supra* note 2 at art 4: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

All these cases illustrate that across the Commonwealth, the judicial courts were prepared to give effect to amendments to the various constitutions of the Commonwealth member states by virtue of implicature. We can discern, starting with *McCawley*'s case and continuing through the various Ceylonese cases of *Bribery Commissioner* and *Kariapper*, right up until the decision of *Independent Jamaica Council*, the emergence of a real, coherent doctrine that purported to rectify glaring inconsistencies between the existing constitutional texts of the Commonwealth states and ordinary legislation by treating the latter as having amended the former and making no distinctions between so-called 'rigid' and 'flexible' constitutions (alternatively known as 'controlled' and 'uncontrolled' constitutions), to borrow the popular phraseology of Dicey.[50]

Drawing on the abovementioned decisions, we can derive the following propositions which arguably constitute the genesis of the doctrine of implied amendments:

1. The doctrine of implied amendments to a constitution is a uniform doctrine that applies to all constitutions, regardless of whether such constitutions prescribe specific amendment procedures or whether they simply permit amendments to be affected by a bare majority vote.
2. Where legislation is enacted which, though inconsistent with the constitution, is not expressly intituled nor expressly states that it is legislation for the purpose of amending the constitution, the enquiry shifts towards the "substance" of the legislation to determine whether the legislation has the practical effect of "amending" the constitution or not.
3. The mere existence of an inconsistency between the provisions of the ordinary legislation and the provisions of the constitutional text would be sufficient to constitute an 'implied amendment'.
4. If the enacted legislation is not expressly stated to be a law for the amendment of the constitution but it is shown that Parliament, in passing the aforementioned law, did intend to effect an amendment of the constitution, that would greatly support the inference that the legislation should be treated as an 'implied amendment' of the constitution.
5. If the ordinary legislation is an implied amendment of the constitution, the judicial enquiry then centres on whether it was passed in accordance with the prescribed amendment procedure, if any.
6. If the ordinary legislation did in fact comply with the amendment procedure, it is treated as a valid amendment of the constitution, thereby obviating any purported inconsistency that arose in the first place. If there was no such compliance, the ordinary legislation would be deemed to be invalid and void by virtue of the inconsistency between it and the constitutional text.

Yet despite the well-established nature and existence of the doctrine of implied amendments in various other common law systems such as Jamaica and Ceylon (modern-day Sri Lanka), the receptivity of this doctrine within the common law system of Singapore remains an open question. It is to this point that our discussion now turns.

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[50] A V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan and Co, 1915) at 122, 123.

III. The Path Not Taken: Implied Constitutional Amendments in Singapore

A. *The Compatibility of Implied Amendments with the Singapore Constitution*

Any discussion of the receptivity of the doctrine of implied amendments within Singapore would be incomplete without first considering whether such a doctrine is in fact legally capable of operating within that constitutional system in the first place. To that end, our inquiry must first begin by addressing the legal-technical question as to whether the doctrine of implied amendments *can* apply in that jurisdiction based on the existing provisions of the *Singapore Constitution* that deal with constitutional amendment.

1. *Singapore*

The provisions dealing with constitutional amendments to the *Singapore Constitution* are contained in Article 5 of the *Singapore Constitution*.[51] Article 5 in its present form is reproduced below:

> **Amendment of Constitution**
> **5.**—(1) Subject to this Article and Article 8, the provisions of this Constitution may be amended by a law enacted by the Legislature.
>
> (2) A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of Members of Parliament (excluding nominated Members).
>
> (2A) [*Deleted by Act 28 of 2016 wef 01/04/2017*]
>
> (3) In this Article, "amendment" includes addition and repeal.[52]

Article 5 was most recently amended in 2016,[53] but these changes, though passed by Parliament, have not yet been brought into force. In any case, these changes are not particularly relevant to the present discussion.[54]

We can see that under Article 5 of the *Singapore Constitution*, a constitutional amendment may be effected in the form of a "law enacted by the Legislature".[55] The

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51 *Singapore Constitution*, *supra* note 2 at art 5.

52 *Ibid*. Prior to the enactment of *Constitution of the Republic of Singapore (Amendment) Act 2016* (No 28 of 2016, Sing), Art 5 of the *Singapore Constitution* contained a sub-article (2A) that stipulated that any constitutional amendments affecting certain provisions such as the fundamental liberties and the office of the Elected Presidency could only be passed by Parliament after it had obtained the support of two-thirds or more of the votes in a national referendum. This Art 5(2A), though enacted as part of *Constitution of the Republic of Singapore (Amendment) Act 1991* (No 5 of 1991, Sing), was never brought into force however: see *Constitution of the Republic of Singapore (Amendment) Act 1991* (No 5 of 1991, Sing) s 3.

53 *Constitution of the Republic of Singapore (Amendment) Act 2016* (No 28 of 2016, Sing) [*Constitution Amendment Act 2016*].

54 The primary changes contained in the 2016 constitutional amendments touch chiefly on amendments that affect certain powers of the Elected Presidency: see *Constitution Amendment Act 2016*, *ibid* at s 3.

55 *Singapore Constitution*, *supra* note 2 at art 5(1).

term "law" is defined in Article 2 of the *Singapore Constitution* as including "written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore".[56] Article 2 further defines "written law" to mean "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore".[57] Thus, on a plain reading of the words in Articles 2 and 5, and upon applying a harmonious construction of the two provisions read together, it would seem that the *Singapore Constitution* can be amended by an ordinary piece of legislation passed by Parliament insofar as it satisfies the rest of the conditions in Article 5.[58]

What are these other conditions? Article 5(2) stipulates that any constitutional amendment shall not be passed by Parliament unless it receives at least two-thirds of the total number of Members of Parliament ("MPs") at both the Second and Third Readings of the amendment bill.[59] Thus, taken together as a whole, any constitutional amendment must command the votes of at least two-thirds of the total number of MPs at both the Second and Third Readings in order to be validly passed by Parliament.[60]

Furthermore, as Article 5 is silent on the express form that the constitutional amendment itself must take, and the plain language of Article 5 is statutorily defined broadly enough to include all forms of legislation that Parliament is capable of enacting,[61] the inescapable conclusion seems to be that constitutional amendments can indeed be enacted in the form of ordinary legislation so long as the said legislation manages to satisfy the procedural requirements in Article 5(2) of the *Singapore Constitution*. An ordinary bill that is not expressly intituled as a constitutional amending bill but which has the practical effect of altering any provisions of the *Singapore Constitution* would arguably come under the procedural framework of Article 5. The inquiry then shifts towards whether such a bill did receive the prerequisite supermajority of votes by MPs in order to be considered a validly enacted implied constitutional amendment. If it did receive the prerequisite majority, then the bill must be taken to have amended the *Singapore Constitution*. If it did not attain the prerequisite majority but was nevertheless successfully passed by Parliament, then it should be treated as a mere ordinary legislation which, though validly passed by a simple majority, is inconsistent with the *Singapore Constitution*, and should thus be rendered void under Article 4.[62]

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56 *Ibid*, art 2(1).

57 *Ibid*.

58 Indeed, the inferral of any further restrictions or conditions on the constitutional amending power where none are expressly stated in Article 5 of the Singapore Constitution would run contrary to the statutory language of the constitutional text itself. But see *Halsbury's Singapore*, *supra* note 1 at para 10.507, n 1.

59 *Singapore Constitution*, *supra* note 2 at art 5(2).

60 Until the 2016 amendments are brought into force, this two-thirds supermajority requirement remains the only procedural requirement for constitutional amendments to be successfully passed by Parliament, unless the amendment in question affects Part III of the *Singapore Constitution*, in which case the amendment must first be supported, at national referendum, by no less than two-thirds of the total number of votes cast by eligible voters: see *Singapore Constitution*, *ibid*, art 8(1).

61 See *Singapore Constitution*, *ibid*, art 2(1).

62 *Ibid*, art 4.

What then of the fundamental liberties[63] in the *Singapore Constitution*? One might be forgiven for thinking that recognition of the doctrine of implied amendments might conceivably pave the way for legislative attempts to run roughshod over such cherished constitutional liberties. In truth, such concerns are quite misplaced. If an ordinary legislation is enacted which purportedly seems to conflict with any of the fundamental liberties, the inquiry must first consider whether or not that ordinary legislation is capable of falling within the scope of any of the exceptions contained in the fundamental liberty clause itself.[64] If it does not, the inquiry then shifts to whether or not the offending legislation was passed with the prerequisite majority under Article 5. If it did receive the prerequisite majority, then the legislation must be taken to have amended the fundamental right in question. If it did not attain the prerequisite majority but was nevertheless successfully passed by Parliament, then it should be treated as a mere ordinary legislation which, though validly passed by a simple majority, contravenes the existing constitutional protections in the *Singapore Constitution* and is thus unconstitutional and void under Article 4.[65]

Here, as in elsewhere, the dividing line between an unconstitutional law and a valid constitutional amendment is the practical effect of the law itself coupled with the total number of votes that it received when voted upon in Parliament. If the law is capable of being interpreted in compliance with any of the provisions of the Constitution, no question of inconsistency or unconstitutionality arises. If, however, it is inconsistent and cannot be rescued by any exceptions contained in the constitutional text nor by any method of statutory interpretation, the doctrine of implied amendments must then apply, in which case Article 5 would be the governing proviso.

One of the most significant objections to this construction of Article 5 was raised by Professor Penna, who asserts that the wording of Article 5 itself is distinguishable from the language of section 29 of the *Ceylon Constitution*.[66] Section 29(4) of the *Ceylon Constitution* begins with the phrase "Provided no bill for the amendment or repeal. . . "[67] whereas Article 5(2) begins with the phrase "A Bill seeking to amend. . .".[68] Because of this semantical difference, Professor Penna argues that *Kariapper* is not applicable to the Singaporean context, thereby precluding the applicability of the doctrine of implied amendments.[69]

With reference to Article 5(2) of the *Singapore Constitution*, Professor Penna argues further that:

> [T]he word 'seeking' [in Article 5(2)] in. . . etymologically connoting the obtaining of desired results refers to the aims, purposes and intentions of the bill. The real purpose of the bill, or its 'pith and substance' becomes very important. Is it an

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63 The fundamental liberties are contained in Part IV of the *Singapore Constitution*: see *Singapore Constitution*, *ibid*, arts 9-16.

64 Obviously, a law that can be justified under any of the exceptions to the fundamental liberties is not an unconstitutional law.

65 *Singapore Constitution*, *supra* note 2 at art 4.

66 L R Penna, "The Diceyan Perspective of Supremacy and the Constitution of Singapore" (1992) 32 Mal L Rev 207 at 227.

67 *Ceylon Constitution*, *supra* note 23 at s 29(4).

68 *Singapore Constitution*, *supra* note 2 at art 5(2).

69 Penna, *supra* note 66 at 227.

> amendment to the constitution? If so, the intention should be categorically spelt out, otherwise the bill will not 'seek' to amend the constitution.[70]

The learned Professor's contention appears to be that a bill's purpose is crucial to determining whether it is a constitutional amendment or an ordinary piece of legislation. If the bill does not expressly endeavour to amend the *Singapore Constitution*,[71] it is not 'seeking' to amend the text as such, which would place it in the latter category as an ordinary piece of legislation. In that case, the bill would not come within the scope of Article 5 because it was never tabled as an amendment bill in the first place. Rather, Article 4 of the *Singapore Constitution* would be the operative clause to govern any issues of inconsistency between the original bill and the *Singapore Constitution*.

Notwithstanding the attractiveness of Professor Penna's line of reasoning, his argument can be disposed of easily for the following reasons. Firstly, it has already been demonstrated, with ample reference to the existing jurisprudence on the doctrine of implied amendments, that it makes no difference whatsoever, nor is it necessary to consider, whether or not the offending legislation in question was intended to be, nor had as its express aim, an amendment of the *Singapore Constitution*.[72] The doctrine of implied amendments is triggered by virtue of the existence of an inconsistency between the impugned legislation and the constitutional text, upon which the inquiry shifts properly to whether or not the former had been enacted in accordance with the procedural requirements for constitutional amendments, this being Article 5 of the *Singapore Constitution* where Singapore is concerned.

At the very most, if a legislative intention that the impugned legislation was indeed intended to be a constitutional amendment can be discerned, that merely serves to *confirm* the original thrust of the analysis that Article 5 is the first port of call.[73] Thus, Professor Penna's claim that Article 5 is concerned primarily with bills that have as their purpose or object the amendment of the *Singapore Constitution* is predicated on a misunderstanding of how the doctrine of implied amendments operates, and is further irrelevant to the question as to whether or not that doctrine can apply to the *Singapore Constitution*.

Secondly, and more importantly, Professor Penna's argument is founded on an implicit construction of Article 5 as applying only to bills that are expressly intituled as constitutional amendment bills. In essence, he seems to be suggesting that the wording of Article 5 itself precludes any application of the doctrine of implied amendments. With the greatest respect to the learned Professor, such a construction of Article 5 is untenable. If Article 5, by virtue of the word 'seeking', does indeed apply only to bills that have as their express aim, object or intention, the amendment of the *Singapore Constitution*, that would in effect be tantamount to reading in an additional procedural requirement into the existing framework for constitutional amendments. No such authority for this interpretation of Article 5 exists, nor does the

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70 *Ibid*.

71 That is to say, the long title of the bill does not categorically state that the bill is a bill for the amendment of the *Singapore Constitution*. See also *Halsbury's Singapore*, *supra* note 1 at para 10.508, n 4.

72 See Part II of the main text above.

73 If such a legislative intention does exist, it would only lend support to the credence that the bill really was meant to function as a constitutional amendment, even if it was not expressly intituled as such.

legislative history of Article 5 suggest that any such procedural requirement exists for the purpose of enacting constitutional amendments beyond the stipulated numerical requirement of a certain number of votes from MPs.

On the contrary, the historical language of the constitutional amendment provisions that predated Article 5 in its current form strongly supports the inference that Article 5 is capable of incorporating the doctrine of implied amendments. Prior to its present form, Article 5 existed in the form of Article 90 within the old *1963 State Constitution*[74] of the State of Singapore when Singapore existed then as a constituent part of the Federation of Malaysia. Article 90 then read as such:

> **90.**—(1) Subject to the provisions of the Federal Constitution and to the following provisions of this Article, the provisions of this Constitution may be amended by a law enacted by the Legislature.
>
> (2) A Bill for making an amendment to this Constitution (other than an amendment excepted from the provisions of this clause) shall not be passed by the Legislative Assembly unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members thereof.
>
> . . .
>
> (4) In this Article "amendment" includes addition and repeal.[75]

One can see that Article 90 as it existed then was virtually identical to the provisions in the *Ceylon Constitution* dealing with constitutional amendment.[76] Had *Bribery Commissioner* and *Kariapper* been decided by the Privy Council while Article 90 in its original form still existed then, there would have been no basis for distinguishing the two cases and section 29(4) of the *Ceylon Constitution* from the *1963 State Constitution*. Clearly, the *1963 State Constitution* then was quite capable of accommodating implied amendments within its existing amendment framework.

It is true that upon Singapore attaining independence in 1965, Article 90 was amended to remove the two-thirds majority requirement.[77] As a result, constitutional amendments could be made to the *Singapore Constitution* by virtue of a bare majority.[78] This changed when the two-thirds majority was restored when the *Singapore Constitution* was amended again in 1979.[79] Article 90, as amended by the 1979 constitutional amendments, now read as such:

> **90.**—(1) Subject to the following provisions of this Article, the provisions of this Constitution may be amended by a law enacted by the Legislature.
>
> (2) Except as provided in clause (3) of this Article, a Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been

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74 *Constitution of the State of Singapore, Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963* (GN Sp No S 1/1963) [*1963 State Constitution*].

75 *Ibid*, art 90.

76 *Ceylon Constitution*, *supra* note 23 at s 29(4).

77 *Constitution (Amendment) Act 1965* (No 8 of 1965, Sing), s 8.

78 *Constitution of the Republic of Singapore* (RS(A) 14 of 1966), art 90 [*1966 Constitution*].

79 *Ibid*, art 52B, as amended by *Constitution (Amendment) Act 1979*, No 10 of 1979, s 7.

> supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.
>
> . . .
>
> (4) In this Article "amendment" includes addition and repeal.[80]

This version of Article 90 ("Article 90, 1979") was retained in the form of the present Article 5 (barring the subsequent changes to this Article) when the Attorney-General enacted the 1980 Reprint of the *Singapore Constitution*.[81] One can see that the statutory language of Article 90, 1979 is *in pari materia* with Article 5(2) of the *Singapore Constitution*. But while the text of Article 90, 1979, evidently differs from Article 90 in the old *1963 State Constitution*[82] ("Article 90, 1963"), this textual difference arguably imported no new procedural requirement for constitutional amendments so as to bar the applicability of implied amendments.

If, as Professor Penna submits, the proper construction of the word 'seeking' in Articles 5 and 90, 1979 is such as to preclude the applicability of implied constitutional amendments, this would have meant that Parliament did in effect seek to impose an additional restriction on its amending powers when it amended Article 90 under the 1979 constitutional amendments, by intending a different construction to Article 90, 1979 than Article 90, 1963. If this was Parliament's intention, it would surely have expressly indicated that the 1979 amendments were meant to effect this additional limitation on Parliament's amending power. However, no such meaning or intention can be derived from the Parliamentary debates at that point of time. Rather, all that can be ascertained is that Parliament simply sought to restore the old two-thirds supermajority requirement, while being content to leave the rest of the constitutional amendment procedure untouched.[83] Taken together, these facts arguably support an inference that the original meaning of Article 5 as it existed then in Article 90, 1963, with regards to the form and manner of constitutional amendments, stood unchanged from 1963 to the present day. If the doctrine of implied amendments was capable of being read into Article 90, 1963 then, surely there is nothing in Article 5 that would preclude a similar application now, especially if both provisions share the same construction.

Admittedly, this argument remains hindered by the fact that no judicial pronouncement on Article 90, 1963 or Article 90, 1979 existed then nor exists currently, leaving us bereft of any additional guidance as to the proper interpretation of these Articles. Nevertheless, it is clear that the constitutional history of Article 5 at least lends support to the argument that one can indeed read an implied amendment into the words of Article 5, contrary to Professor Penna's arguments.

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80 *Ibid*.

81 *Constitution of the Republic of Singapore* (1980 Reprint), art 5.

82 Given that the former now employs the phrase "A Bill seeking to amend. . . " whereas the latter employed the phrase "A Bill for making an amendment. . . ": see *1963 State Constitution*, *supra* note 74 at art 90(2); see also *1966 Constitution*, *supra* note 78 at art 90(2).

83 *Parliamentary Debates Singapore: Official Report*, vol 39 at cols 294-298 (30 March 1979) (E W Barker, Minister for Law and Science and Technology).

B. *The Receptivity of the Doctrine of Implied Amendments in Singapore*

Notwithstanding the possibility that the doctrine of implied amendments can apply in the Singapore constitutional system, most academic and judicial treatment of the subject-matter appears to have been, as asserted earlier, curiously sparse. Some elucidation of the history of the receptivity (or lack thereof) towards the doctrine is necessary. At the same time, it will also be necessary to refer to the historical development of the constitutional amendment procedure in Singapore itself.

1. *Academic Opinion*

The first real consideration of the doctrine of implied amendments arguably arose during the deliberations of the *1966 Constitutional Commission* of Singapore. At that time, one of the issues that the *1966 Constitutional Commission* sought to address was the possibility of entrenching certain provisions of the Constitution, including those that were proposed by the Commission itself.

At the time the *1966 Constitutional Commission* had produced its final report, amendments to the *Singapore Constitution* could be made on the basis of a bare majority,[84] which meant that any constitutional amendment could be passed by Parliament in the same manner as ordinary legislation, much like the situation in Queensland at the time of *McCawley*'s case. Amidst this constitutional background, the Commission considered it desirous to "safeguard against the abuse or misuse, conscious or inadvertent, of majority power and in order to preserve and to foster the people's faith in the democratic system, their belief and trust in the rule of law, and their spirit of racial tolerance and understanding"[85] by entrenching certain provisions of the Constitution. Their first recommended method of entrenchment involved implementing a provision that specified in the Constitution that:

> [A] Bill for an Act of Parliament altering the Constitution shall not be passed by Parliament unless it is expressed to be one for amendment of the Constitution and contains no other provision. Although it is the weakest form of constitutional entrenchment, it nevertheless provides a useful safeguard in that it protects the Constitution from amendment by implication. We think this method will also have some practical value in that it would specifically draw the attention of Members of Parliament and the public to the fact that the government in office proposes to alter the supreme law of the Republic.[86]

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[84] The original State Constitution for Singapore as a constituent state in the Federation of Malaysia stipulated that amendments to the State Constitution required a two-thirds majority of the total number of members of the Legislative Assembly. This requirement was shortened to a simple majority when Singapore attained independence in 1965 and the State Constitution was amended accordingly in 1965: see *Constitution of the State of Singapore, Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963* (GN Sp No S 1/1963), art 90, as amended by *Constitution (Amendment) Act 1965*, No 8 of 1965, s 8.

[85] *1966 Constitutional Commission*, *supra* note 3 at para 75.

[86] *Ibid* at para 76.

Clearly, the *1966 Constitutional Commission* was cognisant of the possibility that the doctrine of implied amendments could very well apply given that at that time, the procedure for constitutional amendments to the *Singapore Constitution* was extremely flexible. It goes without saying that the Commission's proposal would have certainly removed any possibility for the doctrine of implied amendments to operate. Similar such provisions were already in effect prior to the *1966 Constitutional Commission*'s report in jurisdictions such as Ghana[87] and Germany.[88]

Regrettably, although the Government accepted some of the *1966 Constitutional Commission*'s recommendations regarding the entrenchment mechanisms,[89] no such alteration was made to the constitutional amendment procedure in Singapore requiring that a bill for the amendment of the constitution be expressly referred to as such. The end result was that it remained an open possibility that the *Singapore Constitution* could be amended by implication. Likewise, the Constitution could still be amended by a simple majority vote until the 1979 constitutional amendments restored the original two-thirds majority requirement.[90]

Even after this constitutional change, some scholars considered that the doctrine of implied amendments was still capable of operating within the Singapore constitutional context, notwithstanding the increase in the number of votes required for a constitutional amendment to be successfully passed. Professor S Jayakumar certainly felt that this was a real possibility, given that the Government still had not enacted the *1966 Constitutional Commission*'s recommendation to implement the first method of entrenchment, namely that any constitutional amendment bill be expressly specified as such.[91] The learned Professor observed:

> The problem of implied amendments can still arise even with the new requirement of a two-thirds majority for constitutional amendments. This is especially so in the present situation where all the Members of Parliament are from the party in power. Most legislation will be earned by votes exceeding the two-thirds majority. If a particular legislation (which was not expressly stated to be a constitutional amendment) received more than a two-thirds vote but was in conflict with a provision of the Constitution then would such a law (a) be void because of the inconsistency, pursuant to the supremacy clause to Article 52, or, (b) be considered to be an implied amendment of the Constitution? This dilemma can be avoided if the Constitutional Commission's recommendation had been implemented. That this is not an academic problem is clearly demonstrated by the Privy Council decision in *Kariapper v Wijesinha*.[92]

Other commentators, though acknowledging the problematic potentiality for the doctrine of implied amendments to arise in Singapore, have been less pessimistic in

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87 *Constitution of the Republic of Ghana, 1960* (Ghana), art 20(2).

88 *Grundgesetz für die Bundesrepublik Deutschland*, art 79(1).

89 *Parliamentary Debates Singapore: Official Report*, vol 25 at cols 1051-1058 (21 December 1966) (E W Barker, Minister for Law and National Development).

90 *Constitution (Amendment) Act 1979*, No 10 of 1979, s 7, amending the *1966 Constitution, supra* note 78, art 90.

91 S Jayakumar, "The Constitution (Amendment) Act, 1979 (No. 10)" (1979) 21 Mal L Rev 111.

92 *Ibid* at 112, 113.

their observations. Andrew Phang contends that the unique circumstances of *Kariapper*'s case make it weak authority for the applicability of implied constitutional amendments into Singapore given that in that case, the fact that the impugned *Civic Disabilities Act* contained the Speaker's certificate to satisfy the procedural requirements for amending the *Ceylonese Constitution* was evidence that the Act "was intended to be an amendment of the Constitution"[93] and was thus not a "true implied amendment which occurs accidentally".[94] Phang further argues that the Privy Council's judgment ought "thus to be read in the special circumstances under which the Act in question was passed".[95]

Crucially, the learned author submitted that an implied constitutional amendment, so properly understood, is in fact one that:

> [O]ccurs accidentally. . . when the requisite majority necessary to effect an amendment is, by the way, attained in the enactment of a bill, the provisions of which conflict with the provision(s) of the Constitution but which at no time are intended as an amendment of it.[96]

Thus, an implied amendment must be one that is not intended as an amendment of the constitution.[97] Rather, amendment by implication occurs purely by chance in the event of a conflict between the provisions of an enacted bill and the constitution. Phang concludes that though the applicability doctrine of implied amendments in Singapore remains a "distinct possibility",[98] he considers that the doctrine has "little or no real authority"[99] on which it may be supported.

Since then, the doctrine of implied amendments does not appear to have surfaced in any serious academic or judicial discussion, save for Professor Penna's work,[100] whose conclusions have already been addressed, as a passing afterthought in a case comment[101] as well as a footnote to an article in the Singapore Law Review.[102] Although the doctrine continues to be mentioned in several textbooks on constitutional law in Singapore, most existing scholarship has often refrained from adding any significant commentary on the subject, preferring merely to acknowledge its existence as a theoretical possibility.[103] However, the most recent edition of

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93 Andrew Phang Boon Leong, "The Theory of Implied Amendment in Singapore – A Re-Appraisal" (1980) Law Times 26 at 28.

94 *Ibid*.

95 *Ibid*.

96 *Ibid*.

97 With the greatest respect to the learned author, this author would contend otherwise that a legislative intention to amend the constitutional text through the passage of an ordinary law can and should be taken into account as part of the "substance" inquiry into the impugned law's contents.

98 Phang, *supra* note 93 at 28.

99 *Ibid*. At the time of writing, Phang did not have the benefit of the Privy Council's 2005 decision in *Independent Jamaica Council*. This author would proffer that *Independent Jamaica Council* constitutes just the relevant and suitable authority on which an argument could be made that the doctrine of implied amendments applies to Singapore as well.

100 Penna, *supra* note 66.

101 Victor Leong Wai Meng & Roland Samosir, "Forever Immune? *Abdul Wahab b Sulaiman v Commandant Tanglin Detention Barracks*" (1986) 28 Mal L Rev 303 at 316-319.

102 Gary Leonard Low & Chia Jin Chong Daniel, "Tribunal's Findings on the Powers of the Elected President" (1995) 16 Sing L Rev 212 at 226, n 30.

103 This point is examined at the text accompanying *supra* note 1.

Halsbury's Laws of Singapore, in addressing the issue of implied amendments, seems to have adopted the position that that doctrine cannot apply to the *Singapore Constitution*.[104]

In short, the doctrine of implied amendments has generally been received with a considerable degree of wariness throughout Singapore's constitutional history, with academic opinion divided on its operability.

2. *Judicial Decisions and Case Law: A Missed Opportunity for Implied Amendments?*

While academic treatment of the doctrine of implied amendments remains limited and tentative, judicial consideration of the doctrine is virtually non-existent. No case to the author's knowledge has been decided in Singapore and Malaysia where the doctrine of implied amendments, so defined by the author, was accorded any judicial discussion or analysis.

There was however one case[105] heard by the High Court of Singapore and the Federal Court of Malaysia where one of the issues heard was whether the enactment of the *1963 State Constitution* of the State of Singapore upon Singapore's accession to the newly-established Federation of Malaysia had the effect of implicitly repealing[106] a part of the old *Fugitive Offenders Act 1881*[107] that formed a part of the law of Singapore when it was still a British colony. Nevertheless, given that this case concerned the implied repeal of part of an ordinary law by the passage of a constitutional instrument and not the other way around, it is hard to see how this case is useful, much less relevant authority even, in addressing our own inquiry as to the applicability of implied constitutional amendments to the *Singapore Constitution* through the passage of ordinary laws.[108]

In fairness, this existing judicial lacuna may be attributed to the fact that the doctrine has never been cited or raised in any arguments before any judicial body. Yet the present author would venture so far as to proffer that in a few constitutional cases considered by the Singapore courts, the factual and legal issues of these cases were such as to raise the very real distinct possibility of inconsistencies between the Constitution as it existed then and those ordinary laws which were the subjects of the judicial controversies. Such inconsistencies would in turn have warranted a serious consideration of whether the doctrine of implied amendments could then apply.

(a) *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks*: In *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks*,[109] the Applicant had previously been convicted by a General Court-Martial on a charge of having committed a civil offence contrary to the *Singapore Armed Forces Act 1972* [*SAF Act*], the offence being the unlawful possession of a controlled drug in contravention

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104 *Halsbury's Singapore*, *supra* note 1.

105 *Public Prosecutor v Anthony Wee Boon Chye* [1965] 1 MLJ 189 [*Anthony Wee*].

106 *Ibid* at 195.

107 *Fugitive Offenders Act*, *1881* (UK), 44 & 45 Vic, c 69.

108 In any case, counsel's arguments concerning the doctrine of implied repeal were rejected outright by the Federal Court without any extensive judicial consideration: see *Anthony Wee*, *supra* note 105 at 193 and 199.

109 [1985-1986] SLR (R) 7 (HC) [*Abdul Wahab*].

of the *Misuse of Drugs Act 1973*. While the Applicant was in the midst of serving his sentence of detention, the Head of Legal Services of the Singapore Armed Forces appealed against the Applicant's sentence to the Military Court of Appeal ("MCA"). When the appeal was first heard by the MCA on 27 July 1984, the Applicant had already finished his sentence and had also completed his national service, being released from the army on 23 July 1984.

In the course of the appeal, the MCA accepted the appeal of the Head of Legal Services and enhanced the sentence of the Applicant. The result was that the Applicant had to serve the remainder of his sentence at the Tanglin Detention Barracks, prompting the Applicant to file a writ of *habeas corpus* against the Defendant Commandant of the Tanglin Detention Barracks.[110]

In addressing the issue of the Applicant's writ of *habeas corpus* against the Defendant on the basis of the decision by the MCA to enhance his detention sentence, the High Court considered the status of that court as a "superior court of record"[111] from which no writ of *habeas corpus* could lie against any of its decisions. T S Sinnathuray J reasoned that "[w]here courts are expressly declared by statute to be superior courts, it is beyond doubt that the High Court has no supervisory jurisdiction over them".[112] Since the *SAF Act* specifically provided for the establishment of the MCA as a "superior court of record",[113] this meant in effect that the MCA was a superior court whose decisions could not be subject to review by the High Court.[114] Accordingly, Sinnathuray J held that the Applicant's application for *habeas corpus* had no legal basis and was thus rejected accordingly.[115]

The problem with this decision is that it does not adequately account for the proper relationship that the MCA enjoys with the Supreme Court, and ultimately, its constitutional status within the *Singapore Constitution*. Article 93 of the *Singapore Constitution*, which deals with the judicial power, states simply that "The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force".[116] As Victor Leong and Roland Samosir have pointed out, the effect of Article 93 is to delineate the constitutional hierarchy between the Supreme Court, which stands at the apex of the judicial system, and all other "constitutionally subordinate" courts.[117] Furthermore, since the *Supreme Court of Judicature Act* had already established (at the time of *Abdul Wahab*) that the Supreme Court comprises only of the Court of Appeal, the High Court and the Court of Criminal Appeal, the only logical conclusion must be that the MCA is constitutionally subordinate to the Supreme Court, and especially to the High Court, notwithstanding the statutory definition of the former as a superior court of record.[118]

If the implication is that the MCA is an 'inferior' body to the High Court, then it so follows that the High Court's jurisdiction over the MCA could not possibly

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110 See *ibid* at paras 3-6 for the facts of the case.
111 *Ibid* at para 9.
112 *Ibid* at para 14.
113 *Singapore Armed Forces Act 1972* (No 7 of 1972, Sing), s 121(1).
114 *Abdul Wahab*, *supra* note 109 at para 19.
115 *Ibid* at para 24.
116 *Singapore Constitution*, *supra* note 2 at art 93.
117 Leong & Samosir, *supra* note 101 at 307.
118 *Ibid* at 307-309.

have been ousted simply because Parliament enshrined the MCA as a superior court of record in an ordinary statute, due to the existing constitutional provisions on the structure of the judiciary.[119] Either the relevant provisions in the *SAF Act* dealing with the establishment of the MCA are inconsistent with the *Singapore Constitution* and thus void or, if the provisions are to retain their validity, it must be so that the *Singapore Constitution* was implicitly amended when the *SAF Act* was enacted 1972 on account of the mere inconsistency between the two laws. We can see that this situation arguably comes closer to the paradigm "true implied amendment" that Andrew Phang was referring to.[120] Regrettably, however, the argument as to whether the *SAF Act* implicitly amended the *Singapore Constitution* was never raised before the High Court. And while Leong and Samosir argue that the doctrine could not possibly apply in *Abdul Wahab*,[121] this author disagrees and contends that the *SAF Act* did indeed amend the Singapore Constitution by implication. Recognition of this implied amendment would certainly clarify the uneasy constitutional status of the MCA, lest the Singapore courts opt to void the operative provisions in the *SAF Act* instead.

(b) *Wong Souk Yee v Attorney-General*: In 1988, Parliament amended the *Singapore Constitution* and the *Parliamentary Elections Act*[122] to provide for the establishment of Group Representation Constituencies ("GRC"), alongside the existing electoral divisions of Single Member Constituencies ("SMC"). To effectuate this change, Parliament passed the *Constitution of the Republic of Singapore (Amendment) Act 1988*[123] and the *Parliamentary Elections (Amendment) Act 1988*[124] respectively. The *CAA 1988* introduced[125] a new Article 39A in the *Singapore Constitution* which permitted the President to declare any constituency to be a GRC.

Crucially, the Government intended that one of the features of the GRC scheme was that by-elections to a GRC would only be conducted in the event all the MPs of a GRC vacated their seats.[126] However, this particular condition was only enacted under the *PEAA 1988*[127] in the form of a newly-introduced ss (2A) to section 24 of the *PEA* ("s 24(2A) *PEA*").[128] Article 49 of the *Singapore Constitution*, which is the relevant proviso dealing with the filling of vacancies in any parliamentary seat, was left untouched by the *PEAA 1988*. The proper interpretation of Article 49, which had itself been enacted when Singapore's electoral divisions consisted only of SMCs, in light of the 1988 amendments to the *Singapore Constitution*, would subsequently come to be heavily contested in *Wong Souk Yee v Attorney-General.*[129]

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119 *Ibid* at 316, 317.

120 Phang, *supra* note 93 at 28.

121 Leong & Samosir, *supra* note 101 at 317-319.

122 Cap 218, 1985 Rev Ed Sing [*PEA*].

123 No 9 of 1988, Sing [*CAA 1988*].

124 No 10 of 1988, Sing [*PEAA 1988*].

125 *CAA 1988*, supra note 123 at s 4.

126 *Parliamentary Debates Singapore: Official Report*, vol 50 at cols 334, 335 (12 January 1988) (Goh Chok Tong, First Deputy Prime Minister).

127 *PEAA 1988*, *supra* note 124 at s 5.

128 *PEA*, *supra* note 122 at s 24(2A); see also Parliamentary Elections Act (Cap 218, 2011 Rev Ed Sing) s 24(2A).

129 [2018] SGHC 80 [*Wong Souk Yee (HC)*].

In *Wong Souk Yee (HC)*, the Applicant filed an application for *mandamus* requesting that the remaining MPs of the Marsiling-Yew Tee ("MYT") GRC vacate their seats and that the Prime Minister advise the President to issue a writ of by-election for the MYT GRC,[130] as well as an application for declaratory orders that s 24(2A) *PEA* be interpreted to mean that the remaining members of a GRC have to vacate their seats in the event one or more MPs of a GRC vacate their seat(s) or when the only MP in the GRC who belongs to a minority community vacates his or her seat.[131] The Applicant lastly applied, in the alternative, for a declaratory order that s 24(2A) *PEA* was inconsistent with Article 49(1) of the *Singapore Constitution* and was thus void.[132] The High Court rejected all of the Applicant's applications, holding that her proposed interpretation was not supportable based on a purposive interpretation of the *Singapore Constitution*.[133] The Applicant's appeal to the Court of Appeal[134] was likewise rejected.[135]

It is not the purpose of this paper to dwell at length on the judgments of the High Court and the Court of Appeal.[136] However, some degree of analysis of the Court of Appeal's decision is necessary in order to illustrate the difficulties faced by the Court in attempting to reconcile the apparent inconsistency between a constitutional and an ordinary statutory provision.

It is firstly important to note that the Court of Appeal acknowledged that the meaning of Article 49 of the *Singapore Constitution* had become ambiguous in relation to GRCs.[137] This was especially pertinent in light of the Court's earlier decision that Article 49 imposes a mandatory obligation on the Prime Minister to call a by-election for vacancies arising in an SMC within a reasonable time.[138] Although such an interpretation would have made perfect sense given that Article 49 had been promulgated when Singapore's electoral divisions only consisted of SMCs, it was unclear whether that interpretation of Article 49 could be extended to apply to GRCs.[139] If such a mandatory obligation did apply in the context of a vacancy within a GRC, then the Appellant's application for *mandamus* would have been arguably justifiable.

The Court however held that Article 49(1) "when read in the context of the other relevant provisions of the Constitution, in particular, Art 39A and Art 46, does not clearly express the intention that Art 49(1) was meant to apply to seats in a GRC".[140] The Court justified its conclusion by reasoning that the particular phrase "the seat of

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130 *Ibid* at para 3.

131 *Ibid* at para 4.

132 *Ibid*.

133 *Ibid* at paras 61-63.

134 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 (CA) [*Wong Souk Yee (CA)*].

135 *Ibid* at para 97.

136 For an analysis of the High Court's decision in *Wong Souk Yee (HC)*, see Benjamin Low, "Leaving an Empty Seat: *Wong Souk Yee*'s answer to By-Elections in a Group Representation Constituency" *Juris Illuminae* (30 May 2018), online: <http://www.singaporelawreview.com/juris-illuminae-entries/2018/leaving-an-empty-seat-wong-souk-yees-answer-to-by-elections-in-a-group-representation-constituency>.

137 *Wong Souk Yee (CA)*, *supra* note 134 at para 27.

138 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at para 82 (CA) [*Vellama*].

139 *Ibid*. See also *Wong Souk Yee (CA)*, supra note 134 at paras 28, 29.

140 *Wong Souk Yee (CA)*, *ibid* at para 33.

a Member" in Article 49(1) "presupposes the existence of a*vacancy in a particular seat* before a by-election has to be called for that seat".[141] The Court next held that as Article 39A expressly stipulates that elections to a GRC could only be held on the basis of a group of candidates, the cumulative meaning of the two Articles read together must be that by-elections in a GRC could only be held in the event all members of a GRC vacated their seats.[142]

However, this still left unresolved the situation of a single member of a GRC vacating his or her seat. The Court of Appeal hence found it necessary to next refer to the Parliamentary debates to resolve this constitutional ambiguity. The problem though was that while Parliament plainly intended that a by-election to a GRC would only have to be held in the event all MPs in that GRC vacated their seats, Parliament did not make it clear how such a legal outcome would be achieved.[143] As the Court itself noted:

> [W]hile the extraneous material is clear on the intended outcome in this situation, it is unclear as to how Parliament thought it would *effect this outcome*. It certainly expressed this intended outcome in the [Parliamentary Elections Act], but did not expressly do so in the Constitution.[144]

The Court next considered three possible permutations of Parliament's intention in effecting its desired legal outcome but could not say with certainty which of the three permutations was to be preferred based on the extraneous material at hand.[145] The Court eventually concluded, in favour of the Respondent, that the proper interpretation of Article 49(1) was that it did not apply to GRCs at all.[146] Accordingly, the Applicant's reliance on Article 49(1) in support of her application for *mandamus* to hold a by-election in MYT GRC was plainly untenable.

Although the Court of Appeal's decision was correct insofar as a purposive interpretation of Articles 39A, 46 and 49(1) of the *Singapore Constitution* was concerned, the Court regrettably failed to adequately address the consequential constitutional *lacuna* regarding vacancies in a GRC. Most importantly, the Court's decision arguably leaves the constitutional validity of s 24(2A) *PEA* unresolved. If Article 49 is to be considered the authorising provision for legislation dealing with the filling of parliamentary vacancies and the holding of by-elections, then it must so follow *ipso facto* that any ordinary legislation promulgated by Parliament that deals with by-elections must conform to the content of Article 49. The problem, however, is that nothing in Article 49 expressly authorises the specific conditions in s 24(2A) *PEA*, namely that all seats in a GRC must be vacated first before a writ for a by-election can be issued. This is also supported by the Court of Appeal's interpretation of the proviso in holding that Article 49(1) did not apply to GRCs.[147] If that is the case, what then is the constitutional basis for s 24(2A) *PEA*?

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[141] *Ibid* at para 35 [emphasis in original].

[142] *Ibid* at para 37.

[143] *Ibid* at paras 49-53.

[144] *Ibid* at para 54 [emphasis in original].

[145] *Ibid*.

[146] *Ibid* at paras 72, 73.

[147] Rather, the Court of Appeal held that Article 49(1) of the *Singapore Constitution* applied only to SMCs: see *ibid* at para 72. Insofar as this particular holding is concerned, the author respectfully contends that

We are left in something of a constitutional pickle here. Either s 24(2A) *PEA* is somehow able to derive its validity from any provision of the *Singapore Constitution*[148] or, as it prescribes a different requirement for by-elections in a GRC from the mandated regime in Article 49(1) where SMCs are concerned, it is inconsistent with the *Singapore Constitution* and thus potentially void under Article 4.[149] This constitutional *lacuna* could simply have been avoided had the doctrine of implied amendments been raised by the Attorney-General in *Wong Souk Yee (HC)*. One could argue, on the basis of that doctrine, that as the *PEAA 1988* had been passed with a greater than two-thirds majority of votes,[150] it had the cumulative effect of implicitly amending the *Singapore Constitution* by introducing a new provision dealing with the specific issue of vacancies arising in a GRC within the general article on by-elections. This would have obviated any issue as to the validity of the 1988 amendments to the *PEA*. Regrettably, however, this point was never raised in the oral proceedings before the High Court nor the Court of Appeal, nor was it touched on by both courts in their judgments. The end result is that the doctrine of implied amendments continues to receive no judicial recognition in the Singapore courts.

The cases of *Abdul Wahab*, *Wong Souk Yee (HC)* and *Wong Souk Yee (CA)* illustrate that, far from being a simple theoretical consideration relegated to the fringes of academic scholarship, constitutional controversies surrounding ordinary legislation that is purportedly inconsistent with the *Singapore Constitution* are capable of surfacing even today. In such situations, the doctrine of implied amendments clearly has an important role to play in addressing the problem of ordinary legislation that, though passed with a two-thirds or greater Parliamentary majority, might at first blush clash with the provisions of the *Singapore Constitution*. One can expect similar controversies to occur in the future, in which case there might yet be further opportunities for the doctrine of implied amendments to rear its head once more.

C. *Judicial Pronouncements on Constitutional Supremacy: A Dicey Affair for Implied Amendments?*

All the same however, while our analysis of the existing judicial authorities in Singapore has thus far been confined to those cases which potentially support an application

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the wording in Article 49 itself does not permit any such distinction to be drawn between SMCs and GRCs.

148 No such provision in the *Singapore Constitution* in fact exists that would purport to validate s 24(2A) *PEA*.

149 One might very well argue that the Court's pronounced silence on this matter, coupled with its reluctance to adopt an updating or rectifying construction to cure the apparent incongruence between s 24(2A) *PE*A and Article 49, suggests that the Court was of the opinion that the *PEAA 1988* was not a valid constitutional amendment. Yet if this was the case, the Court ought to have made its position clear rather than simply gloss over the issue.

150 A brief perusal of the parliamentary debates shows that the *PEAA* 1988 was in fact passed unanimously: see *Parliamentary Debates Singapore: Official Report*, vol 51 at col 53 (18 May 1988).

of the doctrine of implied amendments but where the courts have remained silent on the matter, it is necessary to address what the courts have actually said with regards to the nature of constitutional supremacy and constitutional amendments in general. Here, the prospects for a successful invocation of the doctrine of implied amendments admittedly become more difficult but not impossible.

Firstly, the oft-repeated affirmations of the principle of constitutional supremacy by the Singapore courts seems to suggest a judicial disinclination towards recognising the validity and acceptability of implied constitutional amendments. This was evident in the decision of *Mohammad Faizal bin Sabtu v Public Prosecutor*[151] where Chan Sek Keong CJ, sitting in the High Court, expressly observed that "the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void".[152] His Honour considered this aspect of the judicial power of the courts to be justified on the basis of Article 4 of the *Singapore Constitution* which, in his opinion, reinforced:

> [T]he principle that the Singapore parliament may not enact a law, and the Singapore government may not do an act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution.[153]

It is true that the learned Chief Justice was speaking in the context of whether or not a particular section of the *Misuse of Drugs Act*[154] amounted to an usurpation of judicial power[155] and was thus an unconstitutional violation of the principle of the separation of powers, but one can see here in *Mohammad Faizal* a particularly robust and broad conception of the principle of constitutional supremacy. It would appear, from the tenor of Chan CJ's words, that any law passed by Parliament that is merely inconsistent with the *Singapore Constitution* would *prima facie* be void and thus unconstitutional *pro tanto*, which goes against the basis of the doctrine of implied amendments.

Secondly, the implication of such a broad conception of constitutional supremacy can only be that Parliament's power to amend the Constitution must be considerably curtailed to the extent that Parliament cannot amend the Constitution by passing ordinary laws that would be inconsistent with the *Singapore Constitution*. This question was addressed in *Nagaenthran a/l K Dharmalingam v Public Prosecutor*,[156] where the Court of Appeal had to grapple with the question as to whether an ordinary legislation that purported to oust the court's power of judicial review was constitutionally valid.[157] Here, although Menon CJ considered the question moot, since

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151 [2012] 4 SLR 947 (HC) [*Mohammad Faizal*].

152 *Ibid* at para 14.

153 *Ibid* at para 15.

154 *Misuse of Drugs Act* (Cap 185, 2008 Rev Ed Sing), s 33A [*MDA*].

155 The judicial power of the Singapore Judiciary is contained in Article 93 of the *Singapore Constitution*: see *Singapore Constitution*, *supra* note 2 at art 93.

156 [2019] SGCA 37 [*Nagaenthran*].

157 In this case, it was another proviso in the *MDA* that was the subject of the constitutional challenge in *Nagaenthran*: see *ibid* at para 18.

in the Court's view, there was no ouster of judicial review in the first place,[158] His Honour did observe, citing *Mohammad Faizal* in support, that if the offending provision did have the effect of ousting judicial review, it would be a contravention of Article 93 of the *Singapore Constitution* and "constitutionally suspect".[159]

The twin decisions of *Mohammad Faizal* and *Nagaenthran* seem to suggest an unwillingness by the Singapore courts to readily accommodate ordinary legislation that might at first blush be inconsistent with the *Singapore Constitution* and potentially void.[160] In such a situation, the doctrine of implied amendments might not necessarily be so eagerly received by the courts, given that the doctrine's effect is to treat inconsistent ordinary law as constituting valid constitutional amendments so long as such ordinary law was passed in accordance with the procedural requirements for constitutional amendments, thus preventing them from being struck down by the courts.

However, lest one might be tempted to treat these decisions as sounding the death knell for the doctrine of implied amendments, there still exists considerable willingness on the judiciary's part to accord considerable latitude to Parliament's power to amend the *Singapore Constitution*. Nowhere is this better exemplified than in the general reluctance of the Singapore courts to adopt the so-called 'basic features' doctrine, whereby a legislative body is precluded from enacting constitutional amendments that would infringe upon the 'basic features' of a constitution.[161] The Singapore courts had cause to consider this issue in the seminal case of *Teo Soh Lung v Minister for Home Affairs*[162] where the applicant challenged the validity of certain constitutional and legislative amendments passed by Parliament that touched on the State's powers of preventive detention on the grounds that these amendments destroyed the "basic structure" of the *Singapore Constitution*.[163]

F A Chua J, in dismissing the applicant's submissions on this issue, made it clear that the 'basic features' doctrine was inapplicable to the *Singapore Constitution* because "[i]f the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But Art 5 of the Constitution does not put any limitation on the amending power".[164] Clearly, Chua J was of the opinion that Article 5 as it stood then (and arguably stands so now) conferred a broad and extensive amending power to Parliament. The point was emphasised again when His Honour observed thus:

> If the courts have the power to impose limitations on the Legislature's power of constitutional amendments, they would be usurping Parliament's legislative function contrary to Art 58 of the Constitution. Article 5 expressly provides that

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158 *Ibid* at para 68.

159 *Ibid* at paras 71-74.

160 Although, curiously, despite such robust affirmations of the judiciary's power to strike down unconstitutional legislation, this power has only been exercised once, albeit unsuccessfully, in a decision of the High Court which was subsequently overturned by the Court of Appeal: see *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 at para 90 (CA).

161 This is the landmark decision of *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 [*Kesavananda*].

162 [1989] 1 SLR (R) 461 (HC) [*Teo Soh Lung*].

163 *Ibid* at paras 30, 31.

164 *Ibid* at para 34.

> any provisions of the Constitution can be amended by a two-thirds majority in Parliament.[165]

These observations in *Teo Soh Lung* have never been challenged in any subsequent judicial decision and thus, for all intents and purposes, remain good law.

How then do we reconcile these disparate pronouncements that on the one hand, suggest that Parliament does not have the competency to legislate on matters that may extend to encroaching on the powers of other constitutionally-prescribed bodies, and on the other, that Parliament has full powers to amend the *Singapore Constitution* in accordance with the requirements of Article 5?

Perhaps one way of doing so would be to accept all these pronouncements as valid and to treat *Mohammad Faizal* and *Nagaenthran* as referring only to ordinary legislation that is not covered by the scope of Article 5, and not to constitutional amendments whatsoever. So understood, in order to determine whether Article 5 is the operative provision in the event an ordinary law is purportedly inconsistent with the *Singapore Constitution*, we must first ascertain Parliament's intention in passing such a law. If Parliament intended for the law to operate as a constitutional amendment, that would suffice to bring it within the scope of Article 5, in which case *Mohammad Faizal* and *Nagaenthran* would not apply since what is now being impugned is not an ordinary piece of legislation, but rather, in effect, a constitutional amendment.

This argument admittedly entails a markedly different conception of the doctrine of implied amendments than what this author had previously argued for,[166] although it would effectively synthesise the disparate positions in *Mohammad Faizal*, *Nagaenthran* and *Teo Soh Lung*.

Alternatively, another solution to this judicial quandary would be to simply treat the pronouncements in *Mohammad Faizal* and *Nagaenthran* as incorrect interpretations of the *Singapore Constitution* in the face of the plain text of Article 5. Although *Mohammad Faizal* and *Nagaenthran* are useful authorities in clarifying the court's power to invalidate legislation under Articles 4 and 93 of the *Singapore Constitution* read jointly together, they are of limited assistance in clarifying the scope of Parliament's power to amend the Constitution and thus ought not to be taken into consideration for the purposes of ascertaining the applicability of the doctrine of implied amendments. Rather, it is the holding in *Teo Soh Lung* pertaining to the wide amending power of Parliament that remains valid and binding as a matter of precedent.[167] And on the basis of *Teo Soh Lung*, one could argue that recognition of the validity of the doctrine of implied amendments is but a logical extension of the principle articulated in that decision.[168]

Admittedly, the judicial authorities highlighted above only serve to illustrate some possible difficulties in making a case for the validity of the doctrine of implied

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[165] *Ibid* at para 35. See also Ray J's forceful dissent in *Kesavananda*, *supra* note 161 at paras 932, 959 and 1078.

[166] Since here, the doctrine of implied amendments would now only apply to a constitutional amendment that was passed in the guise of an ordinary legislation.

[167] See also the Malaysian decision of *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 at 72-74 (FC) which concerned the scope of the Malaysian legislature's power to amend the Malaysian Constitution and which was cited extensively by *Teo Soh Lung, supra* note 162.

[168] For the reasons extensively argued in Part III(A)(1) of the main text above.

amendments within the *Singapore Constitution*. Yet at the same time, there exists judicial authority that arguably militates strongly in the opposite direction. Until a future court addresses these cases, and in turn, the question of implied amendments itself, the applicability of the doctrine of implied amendments to the *Singapore Constitution* will forever be tinged by an element of uncertainty.

IV. Should the Doctrine of Implied Amendments be Recognised in Singapore?

We have already explored in detail the legal development and the general contours of the doctrine of implied amendments through the jurisprudence of the common law systems. We have also dwelt on the academic reception of the doctrine of implied amendments in Singapore, which appears to have treated that doctrine at arm's length, often acknowledging its existence but declining ultimately to ascertain whether it does and should apply in our constitutional system.

On a more practical plane, we have considered the feasibility of reading the doctrine of implied amendments into Singapore's constitutional text, while also drawing on several legal disputes concerning the problematic interpretation of ordinary legislation within the broader constitutional framework as potential avenues for the application of the doctrine. We have also sought to address any potential legal obstacles in the form of existing jurisprudence that might possibly pre-empt any argument in favour of the incorporation of the doctrine.

Having attempted to show that the doctrine of implied amendments *can* apply to the *Singapore Constitution*, we are left with the normative question as to whether it *should* apply. No doubt it will be necessary to venture into the field of constitutional theory itself if one is to effectively articulate a compelling justification for the acceptance of a doctrine as controversial as implied constitutional amendments.

Nonetheless, any such theory of the doctrine of implied amendments would also have to be capable of addressing the various objections and criticisms towards recognising the validity of implied amendments. One of the most significant of these objections is that it would severely undermine the constitutional safeguards against the abuse of the amendment power. If the doctrine of implied amendments is recognised as a part of Singapore's constitutional system, critics contend that the practical effect of this would be that Parliament could easily amend the constitution at will simply by passing any law it so wishes without having to concern itself with the possibility of having such legislation voided by the supremacy clause in the *Singapore Constitution*.[169] To put it more bluntly, recognition of the validity of implied amendments would effectively render Article 4 of the *Singapore Constitution* a nullity. This problem is further compounded by the fact that Parliament remains dominated by a single political party since Singapore became independent in 1965.[170] The potentiality for the repeated abuse of the amending power would be greatly magnified if the constitution could be amended by implication.

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[169] Leong & Samosir, *supra* note 101 at 318, 319.

[170] The People's Action Party has consistently governed Singapore since independence and has usually been returned to Parliament with a greater-than-two-thirds majority in every General Election: see Elections Department, "Parliamentary General Election Results" (27 August 2018), online: Elections Department Singapore <https://www.eld.gov.sg/elections_past_parliamentary.html>.

This contention can be safely disposed of in our attempts to craft a normative justification for the doctrine of implied amendments. One possible theory behind the doctrine of implied amendments is that the doctrine of implied amendments is that, on a fundamental basis, it is not so much the *Singapore Constitution* that is supreme in Singapore but rather, Parliament. This jurisprudential reading of the Singapore constitutional system was advanced by Professor Andrew Harding[171] who, though he was admittedly writing in a rather different context,[172] asserted that legislative supremacy, and not constitutional supremacy, was the true *grundnorm* in Singapore. If we were to transplant Professor Harding's thesis into the realm of constitutional amendment, then no question of constitutional inconsistency arises between inconsistent ordinary legislation and the constitutional text itself. Parliament, as the supreme authority in Singapore, can freely enact any law it so wishes and so change the constitution in any manner to its liking.[173] There is no undermining of constitutional supremacy, so to speak, because the constitution was never supreme. Understood in this light, the Parliament of Singapore increasingly resembles the Parliament of Queensland in *McCawley* as being "the master of its own household".[174]

The advantage of Professor Harding's thesis is that it immediately provides a sound and logical basis for the existence of the doctrine of implied amendments. Nevertheless, his contention that legislative supremacy remains the legal order of the day in spite of the existence of a written constitutional text is not without its criticisms.[175] Suffice to say, the learned Professor seems to have advanced a rather courageous, if not radical, interpretation of the fundamental nature of the Singapore constitutional system. In a similar vein, Professors Jaclyn Neo and Yvonne Lee have noted that "elements of parliamentary supremacy continue to influence constitutional law in Singapore",[176] notwithstanding the *Singapore Constitution*'s express declaration of paramountcy under Article 4. For Professors Neo and Lee, the fact that the constitutional system in Singapore "presumes and works on the basis of a British parliamentary system infused with traditions and mindsets of a supreme Parliament"[177] greatly affects how policymakers, judges, and academics conceive and perceive the operation of constitutional law and elements of constitutionalism in Singapore. In short, the more one endeavours to pierce the veil of constitutional supremacy in Singapore, the more one finds in its stead the spectre of legislative supremacy.

A less controversial alternative would simply be that the doctrine of implied amendments is merely a reflection of the practical effects of attempting to codify and transplant the Westminster system with its various constitutional rules and conventions into a single written constitutional text that has been so characteristic of the

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171 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 Mal L Rev 351.

172 Chiefly, the period of Singapore's constitutional history in 1965: see *ibid* at 351-355.

173 Much like the Parliament of the United Kingdom.

174 *McCawley*, *supra* note 5 at 714.

175 See Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution" (2017) 29 Sing Ac LJ 619 at 645-661.

176 Jaclyn Ling-Chien Neo & Yvonne CL Lee, "Constitutional Supremacy: Still a Little Dicey?" in Li-ann Thio & Kevin YL Tan, eds, *Evolution of a Revolution: Forty Years of the Singapore Constitution* (London: Routledge-Cavendish, 2009) 153 at 186.

177 *Ibid.*

legal development of the member states of the British Commonwealth.[178] Recall that the Westminster system of government as it was originally formulated in the United Kingdom contained within it the principle of Parliamentary sovereignty.[179] This, coupled with the unwritten nature of the United Kingdom's constitution, meant that Parliament had full powers to legislate on any matter, even to the extent of effecting changes to the constitutional system itself by the mere passage of ordinary Acts of Parliament.[180] Parliament too, under the aegis of Parliamentary sovereignty, had full power to enact new laws and amend existing ones by the mere passage of inconsistent laws under what was and remains known as the doctrine of implied repeal.[181] When the British established colonies and with them, institutions for governance such as legislative councils or assemblies, these bodies were for the most part, save for certain modifications and alterations to accommodate local conditions, patterned on the so-called 'classical' model[182] of the Westminster system.[183]

This constitutional trend continued even as the Empire grew and with it, the development of "responsible government" and the gradual devolution of powers away from the Imperial center to the colonies themselves.[184] Legislative bodies, still based on the 'classical' Westminster model, were usually established under letters patent, orders in council or other assorted instruments of government that usually conferred on them full powers to legislate on any matter for the effective governance of the colony in question, save for those matters that had been reserved to the exclusive competence of the Imperial Parliament or which had already been legislated upon by Westminster.[185] The transition to independence however, meant that new constitutions had to be devised for the newly-independent states that arose from the former colonies of the old Empire. These constitutions were drafted with an eye towards retaining many of the characteristics of the Westminster system of government, subject again to modifications as and where necessary.[186] The result was what

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178 Andrew Harding, "The Westminster Model Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States" (2004) 4:2 OUCLJ 143 at 150.

179 Dicey, *supra* note 50 at pp 37-41; see also A W Bradley, K D Ewing & C J S Knight, eds, *Constitutional and Administrative Law*, 16th ed (London: Pearson Education, 2015) at 49.

180 Bradley, Ewing & Knight, *ibid* at 49-52.

181 *Ibid* at 56, 57. See also *Thoburn v Sunderland City Council* [2003] 1 QB 151 at paras 42, 43. Compare Diggory Bailey & Luke Norbury with the collaboration of David Feldman, ed, *Bennion on Statutory Interpretation*, 7th ed (London: LexisNexis, 2017) at 206-209. It should be clarified that the doctrine of implied repeal, though similar to the doctrine of implied amendment, is conceptually different from the latter given that it concerns a purported inconsistency between two Acts of Parliament whereas the latter deals with an inconsistency between a constitution and an ordinary law that is passed subsequent to the commencement of the constitution.

182 The 'classical' model refers to the original conception and design of the Westminster system as it existed in the United Kingdom up until the present day.

183 For a brief account of this historical development, see Martin Wight, *British Colonial Constitutions 1947*, (Oxford: Clarendon Press, 1952) at 15-21.

184 *Ibid*. See also Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, (London: Stevens & Sons, 1966) at 247-257.

185 Roberts-Wray, *ibid* at 247-257.

186 William Dale, "The Making and Remaking of Commonwealth Constitutions" (1993) 42:1 ICLQ 67 at 67-70; see also S A de Smith, *The New Commonwealth and Its Constitutions*, (London: Stevens & Sons, 1964) at 77, 78 [de Smith, *The New Commonwealth*].

de Smith termed the 'export' model[187] of the Westminster system ("Westminster export model"): a system of parliamentary democracy contained within the framework of a written constitution that was usually treated, although this was not always explicitly pronounced in the text itself, as being the supreme law of the jurisdiction and not the legislature.[188]

Much has changed since then and any further exposition on the constitutional development of the Commonwealth countries would require a great deal of discussion that would be beyond the scope of this article. It suffices to say that the peculiar nature of the Westminster export model is such that a legislative body normally endowed with full powers based on the English model must grapple with having its wings clipped under the constitutional text while retaining legislative power.[189] The doctrine of implied amendments gives effect to this understanding by permitting the legislature to exercise its full powers to make laws subject to the written requirements or restrictions laid down in the constitution. As long as these requirements or restrictions are complied with, the legislature retains the power to legislate on any matter, including the power to amend by implication.

Obviously, no such power exists if the constitution expressly stipulates that any law or bill for the amendment of the constitution must declare its nature,[190] for the legislature could no longer be said to have any legal basis for exercising the power to amend by implication. But if the constitution is silent on this matter, then it must be so that the legislature, in the exercise of its legislative power, can still make laws and amend existing laws through implication provided all other requirements have been complied with. The doctrine of implied amendments thus does not obviate constitutional supremacy, as its opponents accuse it of. Rather, it preserves the superior status of the constitutional text by ensuring compliance with the *procedural* requirements for constitutional amendment, while simultaneously allowing Parliament to fully exercise its legislative authority to make laws for the effective governance of the nation. The constitution remains supreme, but beneath this overarching principle, the legislature retains those powers of the Westminster system that have not been expressly removed or restricted by the constitution.

V. Conclusion

It seems curious that for a doctrine so well-established elsewhere across the common law world, the doctrine of implied amendments continues to receive scant academic and judicial attention in Singapore. As stated earlier above at the beginning of this paper, most local academic commentary on the subject appears to have treated the doctrine of implied amendments at arm's length, often acknowledging its existence but declining ultimately to ascertain whether it does and should apply in

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187 De Smith's definition of the "export" model has been adopted here to further demonstrate the gradual divergence between the constitutional development of the former colonies of the British Empire and the original constitutional situation of the United Kingdom itself: see de Smith, *The New Commonwealth, ibid* at 77, 78. See also S A de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government" (1961) 1:1 Journal of Commonwealth Political Studies 2 at 2, 3.

188 de Smith, *The New Commonwealth*, *ibid* at 107-111.

189 Roberts-Wray, *supra* note 184 at 363, 364, 410, 411.

190 de Smith, *The New Commonwealth*, *supra* note 186 at 111.

these constitutional systems. In short, the doctrine seems to have become something of the proverbial pariah in constitutional law and theory, being one of those peculiar topics we do not deign to scrutinise in too great a detail, lest we find ourselves drawn into the rabbit-hole of constitutional theorising.

As argued earlier, this is not a mere matter of creative theoretical abstraction. The problems posed by the existence of purported inconsistences between ordinary legislation and the constitution give rise to a real need to re-examine closely the viability and practicality of applying the doctrine of implied amendments to resolve such legal tussles. The mere fact that the subject-matter in question is controversial should not deter us from embarking on any real, serious intellectual inquiry into the matter and ultimately coming to a decision as to the proper place for the doctrine of implied amendments. It is thus hoped, by this modest contribution, to set the ball rolling by illustrating a possible reconceptualisation of the doctrine of implied amendments in a manner that also accords harmoniously with the relevant provisions of the *Singapore Constitution* that deal with constitutional supremacy and amendments.