

LEGAL SYSTEMS IN ASEAN – SINGAPORE CHAPTER 3 – GOVERNMENT AND THE STATE

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A. INTRODUCTION: THE ADOPTION OF A MODIFIED VARIANT OF THE WESTMINSTER PARLIAMENTARY SYSTEM

Upon attaining independence on 9 August 1965 after peacefully seceding from the Federation of Malaysia, Singapore retained a legal system that is essentially based on the British legal system, a colonial legacy, importing the common law and the Westminster model of parliamentary government, with some notable modifications, including a written constitution. Article 4 declares that the Constitution “is the supreme law of the Republic of Singapore”; hence any legislation which is inconsistent with the Constitution is void, to the extent of that inconsistency.

The Westminster model of representative democracy is predicated on a bipartisan or multi-party system, where the ultimate political check resides in the ability of an opposition party to defeat the incumbent government at general elections and form an alternative government. This check of political turnover is absent in Singapore as the ruling party has a dominant majority in Parliament.

B. PRINCIPLES OF CONSTITUTIONAL GOVERNMENT

Separation of Powers

Singapore has a unicameral Parliament which currently has 84 elected seats. 82 of these seats are held by the ruling People’s Action Party (PAP) while the other 2 are held by Chiam See Tong (Singapore People’s Party) and Low Thia Khiang (Worker’s Party). Government is based on a variant of the separation of powers principle, organised around the familiar trichotomy of powers: the legislature, the executive and the judiciary. Unlike the UK Parliament, the Singapore Parliament is a body constituted under, and deriving powers from, the Constitution. The members who belong to the ruling party are subject to a ‘whip’ system similar to the UK system.

Rule of Law

The Court of Appeal in the seminal case of *Chng Suan Tze v Minister of Home Affairs* affirmed that “The notion of a subjective or unfettered discretion is contrary to the Rule of

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Law. All power has legal limits and the Rule of Law demands that the courts should be able to examine the exercise of discretionary power.”¹ However, statutory clauses purporting to oust judicial review over the exercise of executive powers, such as that of the minister under the Internal Security Act (Cap. 143), have been upheld.² It may be argued that this weakens the judicial role in the protection of civil liberties where national security interests prevail.³

Principle of Secularity

Although there is no express constitutional provision, the 1966 Constitutional Commission report, affirms that Singapore is a ‘democratic, secular state’.⁴ This is distinct from Malaysia’s confessional constitution which enshrines Islam as the Federation’s religion, and privileges it by prohibiting the propagation of other religions to Muslims.⁵ The endorsement of secularism was a deliberate step towards carving a distinct post independence national identity.

The government is secular but is not anti-theistic insofar as the government is not antagonistic towards religious faiths, which would be an invidious policy within multi-religious Singapore, where some 86% of the population profess a religious faith. The religious breakdown of the population has been reported as the following: Buddhists & Taoists (51%); Muslims (15%); Christians (15%); Hindus (4%); No Religion (13%) and Other Religions (2%).⁶ The Singapore polity is secular insofar as the Constitution and legal framework provides that the legitimacy to govern is derived from democratic elections as “ultimate political authority” rather than “any divine or ecclesiastical sanction.”⁷ As evidence of this secularity, Singapore courts such as the Military Court of Appeal will not entertain ‘divine law’ arguments as a basis for invalidating secular laws regulating mandatory military service, as was challenged by a member of the Jehovah’s Witnesses in *Pte Chai Tshun Chieh v Chief Military Prosecutor*.⁸

However, there is no strict separation of Religion and State in Singapore as the model of State-Religion relations is generally more accurately described as co-operationist rather than separationist in nature. Singapore’s model of state-religion relations may be described as “accommodative secularism”,⁹ as the Court of Appeal affirmed in *Nappalli Peter Williams v Institute of Technical Education*¹⁰ noting that ‘the protection of freedom of

¹ [1988] 1 MLJ 133 at 156B-C.

² *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449.

³ See generally Li-ann Thio, ‘*Lex Rex or Rex Lex: Competing Conceptions of the Rule of Law in Singapore*’ (2002) 20 *UCLA Pacific Basin Law Journal* 1.

⁴ Para. 38, 1966 Wee Chong Jin Constitutional Commission, reproduced in Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Butterworths: Asia, 1997) at 1025. The influential Shared Values white paper, released in 1990 (Cmd 1 of 1990), also rejected ‘Belief in God’ as a sixth value on the basis of the principle of secularism: para. 45.

⁵ Articles 3 and 11, Federal Constitution of Malaysia. The Malaysian High Court in *Daud bin Mamat v Majlis Agama Islam* [2001] 2 MLJ 390 held the strict textualist view that Malay Muslims do not have the constitutional right to renounce religion as article 11 provides expressly only for the profession and practice of religion.

⁶ Population Census (2000), David Chan, *Attitude on Race and Religion in Singapore*: (MCDS, 2003) <http://www.mcys.gov.sg/MCDSFiles/download/SAS02RR.pdf>

⁷ Para 5, MRHA white paper (1990).

⁸ *Pte Chai Tshun Chieh v Chief Military Prosecutor* [1998] SGMCA 3 at para. 13.

⁹ [1999] 2 SLR 569 at 576, para 29.

¹⁰ [1999] 2 SLR 569.

religion under our constitution is premised on removing restrictions to one's choice of religious belief".¹¹ Indeed, the High Court in *Colin Chan v PP* noted that "the Singapore Constitution does not prohibit the 'establishment' of any religion;"¹² Indeed, pursuant to its article 152 obligation to care for the interests of racial and religious minorities, especially the Malays as indigenous peoples, the government does provide financial or non-pecuniary support for a religion associated with most Malays, that of Islam. Nevertheless, there are laws such as the Maintenance of Religious Harmony Act (Cap. 167A, 2001 Revised Edition) which allow the minister to issue non-justiciable restraining or 'gag' orders on religious leaders deemed to be using religion as a guise to advance political purposes.

C. THE EXECUTIVE

The President as Ceremonial Head of State

Article 23 of the Constitution provides that the executive authority of Singapore is vested in the President and following the Westminster system of parliamentary government, the President acts in accordance with the advice of the Cabinet in general. Exceptionally, articles 24 and 25 provide that the President acts in his own discretion in relation to the appointment of the Prime Minister and a declaration that this office is vacant. The President also has a role in the grant of pardons, acting on the Cabinet's advice, as provided for in article 22P.

The Elected Presidency

In 1991, a novel constitutional experiment took place when the office of the President was transformed from a ceremonial head of state, like the Queen of England, into one charged with additional executive functions. This stemmed from a perceived need to have a fiscal guardian stand sentinel over the nation's coffers, should "freakish elections" yield a profligate, irresponsible government which dominates Parliament and enjoys "untrammeled power". The government decided by constitutional amendment to transform the presidency into an elective office for a 6 year term. Any irregularities in the election process may be heard by petition to the Election Judge, regulated by article 93A.

The President enjoys immunity from suit for anything done in his official capacity: article 22K. The President is entitled, pursuant to the exercise of his functions, to have access to any information concerning the Government which is available to the Cabinet or any statutory board or Government company stipulated in articles 22A and 22C. The President may require the relevant official to furnish information concerning the Government reserves, those of a statutory body or Government company.

The Pre Selection Process

The President is elected from candidates who must be certified by a non-elected Presidential Elections Committee established by article 18 of the Constitution. The Committee comprises the Chairman of the Public Service Commission, the Chairman of

¹¹ [1999] 2 SLR 569 at 576, para 29.

¹² [1994] 3 SLR 662 at 681G.

the Accounting and Corporate Regulatory Authority, and a member of the Presidential Council for Minority Rights. The decision of the Presidential Elections Committee is not subject to appeal or review in any court.

The criteria for qualifying to run as the elected President are more stringent than the requirements for being elected as a member of Parliament or indeed, the Prime Minister, as stipulated in article 44 (relating to citizenship, age, status as a registered elector, residence for at least 10 years before the date of nomination and language proficiency, as well as not being subject to disqualification by dint of an unsound mind, bankruptcy or being convicted of certain offences). Article 19(2) requires that the Presidential Elections Committee in their subjective opinion find that a candidate is “a person of integrity, good character and reputation”. Further, the candidate must not have a political party affiliation at the date of election nomination and if he holds a seat in Parliament, must vacate this, pursuant to the separation of powers principle. Furthermore, the candidate must hold for a minimum three year period, one of the following offices:

- (i) as Minister, Chief Justice, Speaker, Attorney-General, Chairman of the Public Service Commission, Auditor-General, Accountant-General or Permanent Secretary;
- (ii) as chairman or chief executive officer of a statutory board to which Article 22A applies;
- (iii) as chairman of the board of directors or chief executive officer of a company incorporated or registered under the Companies Act (Cap. 50) with a paid-up capital of at least \$100 million or its equivalent in foreign currency; or
- (iv) in any other similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, in the opinion of the Presidential Elections Committee, has given him such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of President.

Under these criteria, people who might be well-qualified to be Elected President such as diplomats or respected community leaders are excluded.¹³

Removal from Office

The process for removing the President is laid out in article 22L, which provides that the Prime Minister or at least 25% of the total number of elected parliamentarians may give notice of a motion alleging that the President is “permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of (a) intentional violation of the Constitution; (b) treason; (c) misconduct or corruption involving the abuse of the powers of his office; or (d) any offence involving fraud, dishonesty or moral turpitude. Where this motion is adopted by at least 50% of the total number of Parliamentarians, the Chief Justice shall appoint a tribunal to investigate

¹³ For a detailed discussion, see Thio Li-ann, “The elected president and the legal control of government: quis custodiet ipsos custodes?” in *Managing Political Change: The elected presidency of Singapore*, Tan & Lam eds., (Routledge, 1997) at 100-143.

allegations against the President, consisting at least 5 Supreme Court judges. The President may appear before such tribunal and be heard in person or by counsel. If the Tribunal reports to the Speaker that in its opinion the President is so incapacitated, a parliamentary resolution for the removal of the President from his office may be passed by at least three-quarters of the total number of elected parliamentarians.

Powers under the Elected President Regime

The Elected President has a role in safeguarding national reserves, in preventing nepotism by retaining some powers of scrutiny over civil service appointment and as guardian of civil liberties.

A de facto Senate?

In these tasks, the President does not act alone but is variously assisted and/or obliged to consult certain non-elected bodies. In his custodial role the President works in tandem with the moderating influence of the constitutionally established Council of Presidential Advisors (CPA), which seems to serve as a *de facto* Senate, lending their collective wisdom to the President on any matter which the President refers to the Council pursuant to article 21(3) and (4), such as issues pertaining to loan-raising and the appointment of public officers. CPA members are not elected. The President selects 2 members and the CPA Chair, while 4 others are appointed on the advice of the Prime Minister, Chief Justice and Public Service Commission (PSC) Chair. Where the CPA advises the President to withhold assent to a bill, members must indicate the grounds for this. When the President is temporarily unable to discharge his functions, it is the CPA Chair or Speaker that steps in.

The proceedings of the Council are conducted *in camera* although articles 37J(2) and 37J(2A) provide that the Council shall state whether recommendations pertaining to Supply Bills and certain appointments are unanimous or divided. Where the Council recommends that the President withholds his assent to a Supply Bill, it shall state the reasons for its conclusion, which reasons will be communicated to the Prime Minister and to Parliament through the Speaker.

It could be said that the President does not have the final say in many respects as the Constitution provides for a mechanism by which Parliament may override his decision. That is, the institution of the President is itself subject to counter-checks. Thus, when the President, contrary to the recommendations of the CPA, refuses assent to a supply bill or a public appointment such as the Attorney-General, Parliament can override the elected president's decision with a two-thirds parliamentary majority backed resolution. Thus, the elected president cannot hinder a government that controls minimally 66% of parliamentary seats.

Powers of the President over Financial Matters

In relation to matters of finance, the President has a role in guarding national reserves. Pursuant to this, the President could withhold assent to Supply Bills (article 148A), to government loan-raising schemes (article 144) and refuse to approve statutory board budgets (article 22B) where these would draw on the reserves not accumulated by the government or relevant statutory board during the current government's term of office.

The President shall cause his opinion to be published in the Gazette; further, a pragmatic measure allows that statutory board to operate and incur expenditure on the basis of the budget approved for the preceding financial year. Similar provisions apply with respect to government companies. The Constitution requires that the chief executive officer of a statutory board or government company shall inform the President where a proposed transaction is likely to draw down on the reserves accumulated by that body prior to the current term of office of the Government. If the President approves of budgets, bills or transactions¹⁴ which draw on reserves, he is obliged to state his reasons for his decision. This duty to give reasons not only renders the President accountable for his actions, additionally, the publication of these reasons in the Gazette renders them accessible to the public, strengthening openness and transparency in government.

However, his role as a financial guardian was restricted when a constitutional amendment in 1994 removed the operation of the presidential veto over that part of the budget pertaining to 'defence and security measures', which can be broadly interpreted. Under Article 151A, it is provided that the President's power to withhold asset does not apply to 'defence and security measures'. This is defined as "any liability or proposed transaction which the Prime Minister and the Minister responsible for defence, on the recommendations of the Permanent Secretary to the Ministry of Defence and the Chief of Defence Force, certify to be necessary for the defence and security of Singapore, and any certificate under the hands of the Prime Minister and the Minister responsible for defence shall be conclusive evidence of the matters specified." This exception to the highly qualified and elected President's fiscal custodianship was justified on the basis that while the President had some say over measures pertaining to subsidising social services or authorising handouts to the population, he had no role when it came to Singapore's defence and security which was the Cabinet's responsibility therein. The 'second key' over national reserves in relation to such defence bills was conferred upon the substitute guardians in the form of two unelected civil servants: the recommendations of the Permanent Secretary to the Ministry of Defence and the Chief of Defence Force are a precondition to a Minister's certification that a proposed transaction is necessary for Singapore's defence and security. While these two civil servants might possess some expertise in this area, they do not enjoy the same safeguards designed to immunise the President from executive influence.

In 2004, the Constitution was amended to require that a transfer or proposed transfer from a statutory body or government company of any of its reserves to the Government or a Government Company specified in Part II, Fifth Schedule (Government of Singapore Investment Corporation Pte Ltd, MND Holdings Pte Ltd and Temasek Holdings Pte. Ltd) shall not be taken into account in determining whether the reserves accumulated by the transferor board before the current term of office of the Government will be drawn on if certain conditions are met. Rather than subjecting this transfer of funds to Presidential scrutiny, what is required instead is that there be undertakings by the transferee (Board of Directors of Transferee Company) in writing or by resolution that the reserves transferred will be added to the reserves accumulated by the Government/transferee company before the Government's current term of office.

¹⁴ Article 22B(6) and (7).

Powers of the President in Relation to Key Civil Service Appointments

The President has a role in the appointment of key civil service positions listed in article 22. These include Judges, the Attorney-General, Chairman of the Public Service Commission, Auditor-General, Accountable General, Chief of Defence Force, Commissioner of Police and Director of the Corrupt Practices Investigation Bureau.

The elected president may refuse to concur with key civil service appointments. However, article 22(2) provides that where the President acts contrary to CPA recommendations and refuses to make an appointment, Parliament may overrule the President's decision by a resolution supported by two-thirds of the total number of elected parliamentarians.

Similar provisions apply in relation to the President's role in appointing members of statutory boards and directors of government companies.

Powers of the President in Preventing Corruption

Under article 22G of the Constitution, the President can, even without the Prime Minister's consent, concur with the decision by the Director of the Corrupt Practices Investigation Bureau to investigate a Minister.

Powers of the President in Safeguarding Fundamental Liberties

The President has constitutional roles in protecting human rights. Where judicial review is statutorily ousted, the President has a role in safeguarding personal liberty and religious freedom through cancelling ministerial orders under the Internal Security Act (ISA, Cap. 143) or Maintenance of Religious Harmony Act (MRHA, Cap. 167A), under certain conditions. Thus, the Elected President scheme buttresses the separation of powers, in recognition of the need for institutionalised checks on public power. Nevertheless, this safeguard power is limited.

In the case of a detention order under the ISA which deprives one of personal liberty, article 151(4) provides that where the Advisory Board recommends the release of a detainee and the relevant minister rejects this, the detainee shall go free if the President concurs with the recommendations of the Advisory Board. However, if the Advisory Board¹⁵ does not make such a recommendation, the President has no role. Similarly, article 22I provides that where the recommendations of the Presidential Council for Religious Harmony (PCRH) are at variance with Cabinet's decision to issue a restraining order under the MRHA, the president has discretion to confirm, vary or cancel the restraining order and potentially vindicate one's freedom of religion, enshrined in article 15. Of course, if the PCRH is *ad idem* with the Cabinet, there is no presidential safeguard role.

Unlike the advisory board constituted under article 151, section 3(2) of the MRHA provides that at least 10 of the members shall "be representatives of the major religions in Singapore" while the remainder shall be distinguished community members. The appointments to the PCRH are made by the President on the advice of the Presidential

¹⁵ The president has some limited say over the composition of the Advisory Board insofar as he can refuse appointments thereto by dint of article 22(1)(f). Of course, this can be overridden by a two-thirds parliamentary majority vote: article 22(2).

Council for Minority Rights. Certain PCRH members may be considered to be ‘grassroots’ representatives of the people or at least various religious groups, and represent the involvement of Singapore citizens in this important area of decision-making.

D. PARLIAMENT

Legislature and Cabinet: A Fusion of Powers and Personnel

Singapore has a unicameral Parliament with 84 elected seats, and three classes of parliamentarians who are differentiated by virtue of being elected or non-elected. Article 38 states that “the Legislature of Singapore shall consist of the President and Parliament.” This acknowledges the nominal role of the President (who as head of state is also part of the government) in the legislative process. Consistent with Westminster Convention, article 58 provides that presidential assent is necessary before a bill passed by Parliament can become law. Until the advent of the Elected Presidency, assent was given as a matter of course. That there is no strict separation of personnel between constitutional institutions is further illustrated by the fact Parliament plays a role in the formation of part of the “executive” which may be defined as composing the President as head of state, the Prime Minister as head of government, his Cabinet (collectively the parliamentary executive) and the Civil Service.

Parliamentary government does not entail government by Parliament but rather government drawn from and accountable to Parliament. Article 24 of the Constitution expressly incorporates the British convention of Cabinet government, declaring its’ collective responsibility to Parliament. This represents government by a team, which is self-moderating, rather than by one man whereby decisions are reached through discussion and compromise.

In practice, Members of Parliament (MPs) through the party system are subject to the discipline of the party whip and thus, to the party leaders who would usually comprise the Cabinet members. They are not in a strong position to call Ministers to account, where the ruling party holds an overwhelming majority of parliamentary seats. Political power was further centralised through the adoption of anti-hopping laws (article 46), which binds an MP to his political party as his parliamentary seat is contingent on retaining party membership. Thus, where a political party controls 82 of 84 elective parliamentary seats, as the People’s Action Party (PAP) currently holds, it controls both the parliamentary executive and Parliament; its sole check is the parliamentary opposition which debate and scrutinise bills, and where sufficiently sizeable, provide the political check of an alternative government which can oust the incumbent at the next elections.

Owing to the party system, it is the Cabinet executive rather than Parliament which controls the legislative agenda and thus Parliament’s chief function is influencing policy-making, although an individual parliamentarian can always initiate a private member’s bill as permitted by article 59.

A Mixed Electoral System and Non Elected Parliamentarians

Singapore’s parliamentary electoral system is no longer exclusively based on the one-man one vote ‘first past the post system’. Amendments to the Constitution in 1984 and 1990

respectively introduced two classes of non-elective parliamentarians, the Non-Constituency MP (NCMP) and the Nominated MP (NMP) scheme: article 39.

NCMP

Article 39(1)(b) provides that the function of the NCMP scheme is to ensure that a maximum of 6 NCMPs be present in Parliament “to ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government.” In this way, Parliament would never be the sole preserve of one political party, as in the 1970s.

The Parliamentary Elections Act (Cap. 218) regulates the scheme which only comes into operation if less than 6 opposition politicians are directly elected into Parliament; the six top ‘losers’ who garner at least 15% of the vote of the constituency they stood in are offered NCMPships. At face value, they represent the voters who did not support the incumbent government. This is not really an exception to the ‘first past the post system’ since NCMPs, while enjoying the same privileges and immunities as ordinary MPs, are really second class parliamentarians who cannot vote on important bills like Supply Bills and ‘no confidence’ bills. NCMPs will only be appointed if the Singapore legislature continues to be dominated by one party with a pygmy opposition not exceeding double digit numbers.¹⁶

NMP

The introduction of the NMP scheme in 1990 was in part due to what the government considered the failure of the NCMP scheme to serve as a vent for significant alternative views as opposed to the pungent fumes of empty rhetoric. Unlike NCMPs, NMPs are supposed to be apolitical. The Fourth Schedule to the Constitution provides that Parliament’s Special Select Committee, in nominating prospective NMPs, should pay heed to the “need for nominated Members to reflect as wide a range of independent and non-partisan views as possible.” This ‘neutral’ stance is reflected in article 46(2B) which provides that the NMP shall vacate his seat if he is elected or stands in elections as a candidate for a political party (both of which suggest a political agenda). The NMPs are subject to the same limitations as the NCMPs in terms of voting power though their institutional legitimacy is questionable since as ‘appointees’, they lack an elected representative base. An initial fear was that the scheme would be a “backdoor” way of getting the incumbent government supporters into Parliament. Practice has proved this fear unfounded as the general perception seems to be that the NMPs are largely independent agents, albeit approved critics. The general consensus is that the NMPs have acquitted themselves favourably in terms of their parliamentary performance, raising the level of debate and drawing attention to certain issues. They have played an educative function as presenting ‘constructive’ alternative voices and viewpoints which the government can co-opt if it so desires. Concerns about the scheme contradicting the principle of popular representation seem to be largely ignored now, as the ‘expertise’ of NMPs serves as a pragmatic justification for giving voice to their personal views.

These schemes collectively institutionalise some measure of consultation, without threatening the political status quo of a dominant party state. They also discount the

¹⁶ See Valentine Winslow, ‘Creating a Utopian Parliament’ (1984) 28 Mal LR 268.

democratic illegitimacy of having non-elected members in the House of People's representatives.

Group Representation Constituency and Minority Legislative Representation

The original rationale of the Group Representation Constituency (GRC) scheme, which was introduced in 1988 and transformed the electoral system, was to promote political stability by institutionalising multi-racialism in the composition of Parliament. A nominal number of single member constituencies (9) were retained.

After the 1984 elections, the PAP expressed the fear that younger voters preferred candidates best suited to serve their own needs, disregarding the importance of returning “a racially balanced party slate of candidates.” Thus a corrective measure to ensure that majority rule did not entail the neglect of minority interests was introduced in the form of the GRC which is basically a mega-constituency created by the merging together of three former single member constituencies. It is contested on the basis of teams of four to six candidates, one of whom must belong to a stipulated ethnic minority.¹⁷ This institution would subject political parties to a self-check mechanism insofar as successful GRC campaigns would require assembling multi-racial teams, thereby promoting inter-ethnic party alliances and moderate politics. The rationale for its subsequent enlargement from the original 3 member team to 4-6 member teams had little to do with ethnic representation, serving such matters as the smooth running of town councils and community development councils, though such objectives are not constitutionally acknowledged.

Opposition politicians argue they lack human resources to contest GRC wards with a stipulated minority, leading to the situation where they have only been able to contest 2 or 3 of such wards at each General Election. The opposition parties have never been able to win a GRC ward.¹⁸

Notably, the constitution itself does not stipulate a minority quota. An increase in the size and numbers of GRCs might entail a corresponding decline in quantitative minority representation.

Legislative Oversight?

A quasi Second Chamber in the form of the Presidential Council on Minority Rights (PCMR) was established to review legislation to guard against laws with “differentiating measures” which in their practical application would be “disadvantageous to persons of any racial or religious community.” The goal was to protect minority rights. Thus, the PCMR was designed as a mechanism of legislative oversight to obstruct the enactment of legislation that discriminates against communal groups which will threaten racial and

¹⁷ When the GRC scheme was first introduced in 1988, GRC wards were contested on the basis of 3 member teams. This was increased to 4 before the 1991 General Elections. Prior to the 1997 General Elections, up to a GRC could be contested on the basis of up to 6 member teams. Constitution of the Republic of Singapore (Amendment) Act 1996 (No. 41 of 1996).

¹⁸ See generally Thio Li-ann ‘The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of ‘Asian’ Democracy’ (2002) 6 Sing JICL 516-524. For his illuminating analysis on how the GRC affects election strategies and operates in practice, see Kevin Y.L. Tan, Constitutional Implications of the 1991 General Elections, 26 Sing. L.Rev. 46 (1992).

religious harmony in Singapore's multi-racial context. The deficiencies of this institution have been well documented¹⁹.

The PCMR is not a roving body. Article 76(1) states that the general function of the PCMR is to consider and report on matters affecting persons of any racial or religious community in Singapore which Parliament refers to it. Article 77(2) makes it the particular function of the PCMR to draw attention to any Bill or subsidiary legislation which might possibly contain 'differentiating measures.' All PCMR proceedings are held in camera. Furthermore, article 87 provides that "any Minister, Minister of State or Parliamentary Secretary specially authorised by the Prime Minister" may attend these private meetings.

Even if all these inhibiting hurdles are cleared, the PCMR has limited powers even where it finds a "differentiating measure" in a bill. It can make an adverse report to the Speaker who will present the bill to Parliament for amendment. A check exists insofar as article 78(6)(a) provides that such a bill cannot be presented to the President for assent unless the Speaker certifies that it is free of 'differentiating measures.' However, Parliament with a dominant majority can easily circumvent this as article 78(6)(c) provides that notwithstanding an adverse report, the bill can be presented to the President if two thirds of Parliament endorses a motion for bill presentation. In effect, two-thirds of Parliament can render nugatory an adverse PCMR report but not without the resultant publicity.

Presumably, the PCMR in safeguarding minority rights and concerns is drawing parliamentary attention to potentially controversial bills before the bill becomes passed as law. Unfortunately, article 78(1) only obliges the Speaker of Parliament to present an authentic copy of the bill to the PCMR after its third and final stage, prior to the presentment for presidential assent, after the conclusion of parliamentary deliberations. This precludes the consideration of the PCMR report during parliamentary debates. If the PCMR had access to the bill at an earlier stage such as after its first reading, its role in reviewing bills could be enhanced, since its recommendations could be incorporated into the second and third readings debates.

The PCMR's powers of legislative revision are further attenuated by article 78(7) which designates certain types of bills as falling without the ambit of PCMR scrutiny. These include money bills and bills certified by the Prime Minister to be of a nature which "affects the defence or the security of Singapore or which relates to public safety, peace or good order in Singapore" or which are "so urgent that it is not in the public interest to delay its enactment." These wide conditions afford the Prime Minister subjective discretion in his powers of certification. The PCMR has however not made an adverse report in the course of its existence. On one occasion where the bill might contain differentiating measures, the Legislature had thought it fit to amend the Constitution to declare that such laws which would otherwise contravene constitutional provision are nevertheless valid.²⁰ It is arguable that the PCMR's functional design makes it a weak check against the exercise of legislative power.

¹⁹ Thio Su Mien, "The Presidential Council" (1969) 1 Sing LR 2; David S Marshall, "The Presidential Council" (1969) 1 Sing LR 9.

²⁰ The Group Representative Constituency Scheme which requires that a team of 3 to 4 candidates for Parliament must consist of a certain fixed ratio of minority candidates clearly constitutes a "differentiating measure." However, even if the PCMR had wanted to issue an adverse report in this regard, it was incapacitated by virtue of Article 39A(3) which provides that "No provision of any law made pursuant to this Article shall be invalid on the ground of inconsistency with Article 12 or be considered to be a

It may make adverse reports but has never done so. PCMR members include the Chief Justice, Prime Minister (PM), senior Cabinet members, the Attorney General and non-government personnel.

E. THE JUDICIARY

Supreme Court: Composition and Jurisdiction

Part VIII of the Singapore Constitution establishes the Supreme Court and vests judicial power in it by virtue of article 93. The Supreme Court consists of a permanent 3-member Court of Appeal and a High Court and its powers and jurisdiction are delimited by the Supreme Court of Judicature Act (Cap. 322). The Court of Appeal composes of (a) the Chief Justice as President; (b) Vice Presidents; (c) Judges of Appeal (other than Vice Presidents) and (d) other High Court judges who may be appointed from time to time. As the highest appellate court (civil and criminal), it sits as a bench of at least 3 judges, but may constitute a bench of 5 to 7 judges. It may only hear appeals on questions of law, not fact and its decision are binding on all other courts in the judiciary hierarchy except for itself.

The High Court consists of puisne judges and Judicial Commissioners (JCs) or short term judges. Where the President concurs with the advice of the Prime Minister, he may appoint a person qualified to be a Judge of the Supreme Court as a Judicial Commissioner, for stipulated periods of time, with the powers of a High Court judge, sans tenure. Indeed, article 94(5) permits the President to appoint a qualified person “to hear and determine a specified case only.” The pragmatic role of JCs is “to facilitate the disposal of business in the Supreme Court (article 94(4)).”²¹ Although JCs enjoy the same powers, functions and immunities of other judges, they do not enjoy tenure beyond the fixed term.

The High Court exercises both original and appellate jurisdiction over criminal and civil matters. The jurisdictional minimum threshold for the High Court with respect to civil claims is \$250,000. It does not have jurisdiction over matters allocated to the Syariah Court, established by the Administration of Muslim Law Act (Cap. 3), in relation to Muslim law matters relating to marriage and divorce. Under section 17A of the Supreme Court of Judicature Act, the High Court enjoys concurrent jurisdiction with the Syariah Court over certain civil proceedings relating to child custody, maintenance for wife or child and the division of property upon divorce in the case of Muslim marriages.

Specialist courts within the structure of the Supreme Court have been established, staffed by judges with specialist knowledge in certain areas of law. These include the Admiralty Court and Intellectual Property Court, created in 2002.

differentiating measure under Article 78”. Prior to the 1997 General Elections in January, Article 39A of the Constitution was amended to increase the size of GRC teams up to 6: Constitution of the Republic of Singapore (Amendment) Act 1996 (No. 41 of 1996).

²¹ Law Minister Barker: Second Reading, *Singapore Parliamentary Debates, Official Records*, 24 July 1984, col 297.

Constitutional Tribunal

The Constitution provides for one specialist court which is constituted on an ad hoc basis. Article 100, which was introduced in 1994, provides that the President with the approval of the Cabinet may refer a question to an ad hoc constitutional tribunal regarding the actual or prospective effect of any constitutional provision. The Tribunal is to consist of a minimum of 3 Supreme Court judges and the opinion of the majority of its Judges on the validity of any law or legal provision shall not be questioned by any court. Thus far, there has only been one constitutional reference heard, although there have been requests for other questions to be put to the Tribunal,²² which was in relation to the scope of the powers of the elected presidency.²³

Judicial Independence and Appointment

The appointment of the Chief Justice, who heads the entire judicial system, judges and judicial commissioners is subject to the concurrence of the elected President: article 22(1)(a).

The Constitution provides for the method of appointing, removing and safeguarding the independence of judges during the tenure of their office. The Constitution safeguards judicial independence through various provisions, such as fixing tenure at 65 and article 98 guarantees against adverse changing of judicial remuneration after appointment and guarding against the abolition of the office of Judge of the Supreme Court during a Judge's term in office. There have been cases where judges who are beyond 65 years of age have remained in office on the basis of contracts ranging from 6 months to 3 years. Article 94(3) expressly provides for supernumerary judges in that persons ceasing to hold office as Supreme Court judges may be appointed as Chief Justice, Court of Appeal or High Court judges for such periods as the President, acting in his discretion, shall direct, if he concurs with the Prime Minister on this matter.

Article 99 restricts the discussion of the conduct of a Supreme Court judge by Parliament unless a parliamentary motion calling for this and eliciting the support of a minimum of one-quarter of the total number of the Members of Parliament is first given. In addition, the Supreme Court may protect itself and the administration of justice from critical speech which may undermine the administration of justice by causing the erosion of public confidence in the judiciary through the common law contempt of court offence known as 'scandalizing the court', which is a constitutionally recognised qualification to the article 14 free speech clause.²⁴ The current test of whether critical speech is contemptuous is

²² Opposition politician JB Jeyaretnam wanted to ask the tribunal whether the Public Entertainments Act was constitutional, and whether the approval of Parliament and the President was required before the government made a sizeable loan to Indonesia. 'Constitutional Tribunal Plea Rejected', *Straits Times* (Singapore.), Jan 30, 1999 at 54. 'Send USSGD 5b Loan Case to Constitutional Court', says Jeya, *Straits Times* (Singapore), Nov. 24, 1997 at 28.

²³ In the matter of Articles 5(2), 5(2A) and 22H(1) of the Constitution of the Republic of Singapore, Const. Reference No. 1 of 1995, [1995] 2 SLR 201. For a discussion, see Thio Li-ann 'Working out the Presidency: The Rites of Passage, (1995) SJLS 509; for a reply, see Attorney- General SK Chan, Working out the Presidency: No Passage of Rights, (1996) SJLS 1-39.

²⁴ The leading cases are *AG v Barry Wain* [1991] 2 MLJ 525 and *AG v Lingle* [1995] 1 SLR 696 (High Court); these tend to weigh more heavily the importance of preserving judicial institutional reputation over the role of free speech in the workings of a democracy.

found in *AG v Wain*²⁵ and is tilted in favour of protecting judicial reputation in that it merely requires that the critical words must have an 'inherent tendency' to interfere with the administration of justice. This may be contrasted with the American requirement that the words, in relation to administrative justice, pose a 'clear and present' danger, the English test that the words present a 'real risk; rather than a 'remote possibility' and the Canadian test that danger to administration of justice is 'real, substantial and imminent' to a reasonable person.²⁶

The Singapore constitution departs from British practice by transferring control of the removal process from the legislative to a judicial forum. Article 98(3) provides that a 5 member Tribunal of Peers shall investigate any representation made by the Prime Minister or Chief Justice (after consulting the Prime Minister) to the President. If the Tribunal recommends that a judge be removed "on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office," the President (acting on the cabinet's advice) may remove the Judge from office. The additional safeguard to the judge is that he is not left to the mercy of the legislature; his peers must also find him unfit.

Abolition of Privy Council as Final Court of Appeal

Among the departures from British practice was the abolition of the jury system.²⁷ Up until August 8, 1994, the Privy Council was the final Court of Appeal for civil and criminal cases. Singapore cut off ties with the Privy Council as its highest Court of Appeal, partly because its judges were no longer attuned to local conditions. The Court further paved the way towards developing an autochthonous public law in adopting a 1994 Practice Statement on Judicial Precedents,²⁸ which states that Privy Council decisions did not bind the Court of Appeal which would nevertheless depart from them sparingly, "bearing in mind the danger of retrospectivity disturbing contractual, proprietary and other legal rights":

We recognise the vital role that the doctrine of stare decisis plays in giving certainty to the law and predictability in its application to similar cases. However, we also recognize that the political, social and economic circumstances of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the fundamental values of Singapore society.

However, there is a discernible dichotomised approach²⁹ in that the English model for private commercial law continues to be applied to promote certainty and stability, whereas there was no compelling imperative to continue English public law approaches, given the increasing influence of European Court of Human Rights jurisprudence on English courts which were not considered appropriate in Singapore.³⁰ The judicial task was thus to

²⁵ [1991] 2 MLJ 525.

²⁶ See respectively *Bridges v California* 314 US 252 (1941), *AG v Times Newspaper* [1974] AC 273; *R v Kopyto* (1987) 39 CCC (3d) 1.

²⁷ Jury trial was imported into Singapore and Malaysia during the colonial era and was abolished in Singapore by 1970. See Andrew Phang, *Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution*, 25 Malay. L. R. 50 (1983).

²⁸ Practice Statement (Judicial Precedent issued July 11, 1994), (1994) 2 SLR 689.

²⁹ See Eugene KB Tan, 'Law and Values in Governance: The Singapore Way', (2000) 30 H.K. L.J. 91.

³⁰ Law Minister S Jayakumar, 52 *Singapore Parliament Debates*, 25 Jan 1989 cols. 463ff at col. 468.

articulate a public law jurisprudence inspired by local values, which would entail according greater weight to collective interest and balancing.³¹

The common law of Singapore has to be developed by our Judiciary for the common good. We should make it abundantly clear that under the Constitution of our legal system, Parliament as the duly elected Legislature enacts the laws in accordance and consistent with the Constitution of Singapore. If there is any repugnancy between any legislation and the Constitution, the legislation shall be declared by the Judiciary to be invalid to the extent of the repugnancy.³²

Judicial Power

Power to Strike down Unconstitutional Acts and Judicial Review

The Singapore judiciary enjoys broader judicial powers than English judges who check government powers primarily through administrative law principles. The Supreme Court possesses the power to review legislation and to strike down unconstitutional laws pursuant to the Article 4 supremacy clause, along the lines of the famed US Supreme Court decision in *Marbury v Madison*.³³ As English Law Lord Diplock noted in relation to the Malaysian judiciary (equally applicable to Singapore), judges in the public law field bore “an even greater responsibility” than English judges owing to the “new dimension” in the judicial control of the government which extended to the legislative branch.³⁴ This power is exercised sparingly and has yet to result in an invalidated Act.³⁵ Thus, an extended *ultra vires* doctrine applies in Singapore, mandating the courts to ensure that the legislature acts within constitutional boundaries and administrative bodies, within their statute-derived powers.

Maintaining the Constitutional Delimitation of Powers

An aspect of judicial power is to ensure that the constitutional delimitation of powers is observed, pursuant to the separation of power principle. For example, in *Public Prosecutor v Salwant Singh s/o Amer Singh*³⁶ the executive in exercising its foreign relations power entered into an agreement with India in relation to the extradition of the accused who was liable under section 12(2) of the Criminal Procedure Code (Cap. 68) to be subject to an order of preventive detention for a term ranging from 7 to 20 years. The extradition order purported to limit the judicial discretion in the sentencing process as this order conditioned extradition to Singapore from India on the basis that the accused could only be sentenced for a maximum of up to 7 years. The issue arising was whether this was an executive intrusion into judicial power in relation to sentencing. Kow Keng Siong DJ affirmed the supremacy of domestic law over binding international legal agreements. The terms of the extradition order, negotiated by the executive branch of government, was irrelevant as

³¹ See generally Thio Li-ann, ‘An “i” for an “I”: Singapore’s Communitarian Model of Constitutional Adjudication’ (1997) 27 H.K. L.J. 152 (1997).

³² *Nguyen Tuong Van v PP* [2005] 1 SLR 103 at para 88.

³³ 5 U.S. 137 (1803).

³⁴ Lord Diplock, ‘Judicial Control of Government’, Second Tun Abdul Razak Memorial Lecture at University of Malaya, Kuala Lumpur (June 4, 1979) in [1979] 2 Malay. L. J. cxl.

³⁵ To my knowledge, there has only been a single instance when the High Court sought to void a legislative provision (Prevention of Corruption Act) for being unconstitutional, though the decision was later overturned on appeal. See *Taw Cheng Kong v PP* [1998] 1 SLR 943 (High Court); [1998] 2 Sing LR 410 (Court of Appeal).

³⁶ [2003] SGDC 146.

Kow DJ considered that the contention that sentencing discretion was ‘fettered by the views of an organ of a foreign state’ offended the international principle of state sovereignty. At international law, of course, it is settled that a state may limit its sovereignty through voluntarily entering into binding international agreements. The Singapore Constitution currently does not contain a provision which provides that national sovereign powers may be limited in the interests of international law and co-operation, nor does it explicitly address the hierarchical ordering of international law and domestic law.

Kow DJ asserted that domestic law prevails over the terms of Singapore’s international agreement with a foreign state in the event of conflict, given that article 4 of the Constitution declares the supremacy of the Constitution and the nullity of inconsistent legislation. This affirmed the prevailing dualistic approach in ordering the relationship of international law to Singapore municipal law, which rejects the notion of self-executing treaties or international instruments. Rather, an international agreement must be formally incorporated into the corpus of Singapore law to be given effect within the domestic legal order, approving the UK position in *JH Rayner v Dept of Trade* [1990] 2 AC 418. Even a treaty signed between the Singapore and Indian government stipulating a maximum sentence would not be judicially enforceable as “matters relating to sentencing is constitutionally vested in the Judiciary, not the Executive: Article 93 of the Constitution.” While Singapore may incur international responsibility, the current orthodoxy is that Constitutional Law is supreme and takes precedence over unincorporated international agreements; thus, sentencing powers, as an aspect of article 93 judicial power, prevails over the terms of extradition agreements.

Judicial Review and the Judicial Role in Safeguarding Part IV Liberties

In addition, the judiciary is the guardian of Part IV fundamental liberties. These constitutional liberties include the right to life and liberty (article 9), prohibition against slavery and forced labour (article 10), protection against retrospective criminal laws and repeated trials (article 11), equal protection under the law (article 12), prohibition of banishment and freedom of movement (article 13), freedom of speech, assembly and association (article 14), freedom of religion (article 15) and rights in respect of education (article 16).

Limits on Judicial Review

Notably, article 149 provides that legislation against subversion enacted under the authorisation of Part XII (Special Powers against Subversion and Emergency Powers) shall be valid “notwithstanding that it is inconsistent with Article 9, 11, 12, 13 or 14.” These would include preventive detention laws like the Internal Security Act (Cap. 143). Nevertheless, article 151 provides certain procedural safeguards for detainees, in the form of requiring the detaining authority to inform the detainee of the grounds of detention, allegations of fact on which the order is based and shall provide an opportunity for making representations against the order “as soon as may be.”

Although there is no express constitutional right of access to a judicial remedy, this is accepted in practice. Judicial review may be restricted or excluded by statutory ouster and limitation clauses. For example, section 18 of the Maintenance of Religious Harmony Act (Cap. 167A) provides that “All orders and decisions of the President and the Minister and recommendations of the Council made under this Act shall be final and shall not be called

in question in any court.” Under the Internal Security Act (Cap. 143), section 8B(2) provides that: “(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision.” This truncates the judicial role as guardian of the constitutional liberties involved, e.g. articles 9, 12, 14 and 15.

Approach towards the Constitutional Adjudication of Liberties

In the Privy Council decision of *Ong Ah Chuan v Public Prosecutor*,³⁷ Lord Diplock stated that in interpreting the bill of rights of a Westminster-based constitution, the reference to the word “law” particularly as it related to derogation clauses (“in accordance with law”), did not merely refer to a collection of rules; instead, it referred to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. Liberties would be “little better than a mockery” if they could be curtailed by a legal system which flouted these fundamental rules.

However, the Singapore courts in subsequent cases have not developed a pro-individual reading of fundamental liberties; instead, the dominant approach of the courts has been to affirm community or statist values to buttress public goods over rights. For example, in *Colin Chan v Public Prosecutor*,³⁸ the High Court in affirming the primacy of public order declared that while constitutional liberties like religious beliefs ought to have “proper protection”, actions pursuant to them must “conform with the general law relating to public order and social protection.” He declared: “The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained.” An approach oriented towards affirming rather than reviewing parliamentary intent was evident in the Court of Appeal decision of *Jabar v Public Prosecutor*³⁹, which concerned the ‘death row phenomenon’ as a possible challenge to the constitutional provision in article 9 that no one is to be deprived of life or liberty “save in accordance with law.” It was argued that with respect to a person convicted of murder and sentenced to death that the passage of more than 5 years since the imposition of the death sentence made its execution unconstitutional, as this would be a deprivation of life not “in accordance with law” as article 9(1) requires. This argument involved reading the prohibition against cruel and inhuman punishment into the word “law” as a facet of the standards of fairness “law” embodied. In its adherence to literalism, the Court of Appeal declared that: “Any law which provides for the deprivation of a person’s life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.”⁴⁰

Fortunately, the Court of Appeal in *Nguyen Tuong Van v PP*⁴¹ in applying the reasonable classification test to ascertain the constitutionality of a law which drew differentiation between classes in relation to drug-trafficking offences accepted that it was wrong to

³⁷ [1981] 1 MLJ 64; [1980-1981] SLR 48.

³⁸ [1994] 3 SLR 662, 688E-G.

³⁹ [1995] 1 SLR 617 (Court of Appeal, Singapore). See Thio Li-ann, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam*, [1997] SJLS 240-290.

⁴⁰ [1995] 1 SLR 617 at 631B.

⁴¹ [2004] 2 SLR 328.

decide the issue of the constitutionality of a differentiating trait on “a blind acceptance of the legislative fiat” and it was the judicial duty to ascertain “the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation”.⁴² The High Court had stated there is room for debate whether “so long as it is validly passed by Parliament” refers to the compliance with the processes for passing an Act or to its constitutional validity, that is, the substantive principles or values contained in the Constitutional text therein. The High Court considered that it related to both “as the court must be concerned that statutes be properly enacted and do not contravene the Constitution.”⁴³ The Court of Appeal also acknowledged that customary international law could be adopted by domestic Singapore courts, provided that this is “clearly and firmly established.”⁴⁴

Supervisory and Revisionary Jurisdiction

The supervisory jurisdiction of the High Court to control the action of subordinate courts is found in section 27 of the Supreme Court of Judicature Act (Cap. 322). The First Schedule to the Act sets out the power of the High Court to issue prerogative writs, stating the High Court has the “Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of any of the rights conferred by any written law or for any purpose.” The revisionary jurisdiction of the High Court to call for records of a subordinate court for review is contained in section 27 of the Supreme Court of Judicature Act under which the High Court may ‘exercise powers of revision in respect of criminal proceedings and matters in subordinate courts’⁴⁵ and to ‘call for and examine the record of any civil proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any decision recorded or passed, and as to the regularity of any proceedings of any such subordinate courts.’⁴⁶ Powers of revision cannot be exercised if there is available an appeal from the subordinate courts.

With respect to criminal matters, the review jurisdiction of the court to reconsider its own previous decisions is contained in section 217 of the Criminal Procedure Code (Cap. 68):

217.—(1) No court other than the High Court, when it has recorded its judgment, shall alter or review the judgment.

(2) A clerical error may be rectified at any time and any other mistake may be rectified at any time before the court rises for the day.

⁴² [2005] 1 SLR 103, para 73.

⁴³ *PP v Nguyen Tuong Van* [2004] 2 SLR 54 at para 77. See Li-ann Thio, ‘The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004)’, (2004) 4 (2) *Oxford University Commonwealth Law Journal* 213-226.

⁴⁴ *Nguyen Tuong Van v PP* [2005] 1 SLR 103 at para 88.

⁴⁵ Section 23, SCJA.

⁴⁶ Section 24, SCJA.

Administrative Review and Grounds of Judicial Review

In terms of the judicial review of administrative action, Singapore courts have largely followed Lord Diplock's threefold classification of grounds of review in the *GCHQ* case⁴⁷, whose analytical framework was adopted by the Court of Appeal in *Chng Suan Tze v Minister of Home Affairs*.⁴⁸ These relate to illegality, irrationality, procedural impropriety though "proportionality" has not been accepted as an independent head of review, but subsumed as a facet of "unreasonableness" or irrationality.⁴⁹ Contravention of any of these non-mutually exclusive grounds will render a decision *ultra vires*. The courts have demonstrated self-restraint as reflected in the adoption of the doctrine of justiciability with respect to certain public law fields where *e.g.* national security or international relations are involved, stemming from practical considerations. This is an exception to the rule law as executive action is immunised from the control of legal principles. As noted in *Chng Suan Tze v Minister for Home Affairs*:

what national security *requires* is to be left solely to those who are responsible for national security...However...it has to be shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.⁵⁰

The Court of Appeal affirmed the approach in the *GCHQ* case where the House of Lords had determined that the relevant decision was in fact based on national security considerations and that it was for the executive to decide if this outweighed considerations of fairness and legitimate expectation. The Court of Appeal in *Chan Hiang Leng Colin v Minister for Information and the Arts* affirmed that issues of national security were non-justiciable.⁵¹

Review of Quasi-Laws

The High Court has also given effect to informal rules in *Lines International Holding Pte Ltd v Singapore Tourist Promotion Board and Port of Singapore Authority*⁵² which the relevant government body is under no duty to publish in the gazette, even though these are not legally binding. Nevertheless, they have some legal effect. Judith Prakash J noted that were it the case that statutory formulations could not formulate a policy or guideline except through duly promulgated regulation, "then everything would come to a grinding halt while policy decisions had to be communicated to the Attorney-General's Chambers, then drafted into regulations and then the drafts approved by the organisation concerned before being sent on to Parliament and not effected by gazette notification. This is not the way the executive arm of any common law country functions."⁵³ The learned judge identified four conditions that validated the adoption of a general policy. First, the adoption of a general policy must not fetter the discretion of the relevant authorities such

⁴⁷ [1985] 1 AC 374.

⁴⁸ [1988] SLR 132.

⁴⁹ *Kang Ngah Wei v Commander of Traffic Police* (2002) 1 SLR 213 at para 17.

⁵⁰ [1989] 1 MLJ 69 at 83F-H.

⁵¹ [1996] 1 SLR 609 at 619B-E where Karthigesu JA noted it was not for the court to consider how many people must refuse to do National Service in the name of conscientious objection before this threatened national security.

⁵² [1997] 2 SLR 584 (High Court, Singapore).

⁵³ [1997] 2 SLR 584 at 608A-B.

that they are unprepared to deal with exceptional cases⁵⁴. Second, the guidelines must be made known to the persons affected. The rule of law demands that a person should not be disadvantaged through his ignorance of guidelines in planning decisions. The idea is that one must know what the law is to make decisions in reliance of this knowledge. Otherwise, false expectations might be excited and perhaps even cruelly dashed. Third, the policy must not be unreasonable in the limited *Wednesbury*⁵⁵ sense. Lastly, in considering what ‘reasonableness’ constituted, the courts were to vigilantly bear in mind that they were not to substitute their views of how the discretion should be exercised. There was a presumption that the policy was legal and on the plaintiffs rested the burden of proving it ultra vires: *Chan Hiang Leng, Colin v PP*.⁵⁶

Remedies for Judicial Review and Standing

To invoke the jurisdiction of the court in seeking a judicial remedy, a litigant must be able to show locus standi or standing.⁵⁷ This is a judicial technique which allows the courts to determine entitlement to challenge administrative decisions and bring an action for redress against an administrative illegality and to weed out frivolous or vexatious litigants.

The new English Order Rule 3(5) provides that “The Court shall not grant leave unless it considers that the applicant has a *sufficient interest* in the manner to which the application relates (*italics mine*).” Order 53 of the Singapore Rules of Court reads: “No application for an order of mandamus, prohibition or *certiorari* shall be made unless leave to make such an application has been granted in accordance with this Rule.” Nevertheless, the court in *Dow Jones* and *Colin Chan* both cited with approval Lord Wilberforce’s statement in *IRC v National Federation of self-employed*⁵⁸ case where he considered what constituted sufficiency of interest:

it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot...be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context⁵⁹.

The ‘sufficient interest’ test is sufficiently open-textured to be capable of encompassing a wide variety of meaning. Within Singapore, a liberal approach to standing was applied by the Court of Appeal in *Chan Hiang Leng, Colin v Minister for Information and the Arts*⁶⁰ where the constitutional right to religious liberty was infringed by a ministerial order under the Undesirable Publications Act (Cap. 338) which prohibited the import, sale or distribution of publications of the International Bible Students Association (ISBA) which was associated with a religious sect known as the Jehovah’s Witnesses (JWs). The Congregation of the Jehovah’s Witnesses had been deregistered in 1972 under the Societies Act (Cap. 311) for being a threat to public welfare insofar as its conscientious objector stance against compulsory military service contravened a national policy. Karthigesu JA adopted a “citizen action” view of standing in preference over Prakash J’s

⁵⁴ See *British Oxygen Co. Ltd v Board of Trade* [1971] AC 610 and *In re Findlay* [1985] AC 610.

⁵⁵ [1948] 1 KB 176.

⁵⁶ [1994] 3 SLR 662.

⁵⁷ See generally SM Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971).

⁵⁸ [1981] 2 All ER 93 at p106.

⁵⁹ [1981] 2 All ER 93 at 96.

⁶⁰ [1996] 1 SLR 609.

adoption of a “private rights model” in the High Court which restricted standing to those directly affected. In so doing, Karthigesu JA affirmed the role of the citizen in ensuring the public accountability of officials. The Court of Appeal rejected the submission that only office-holders of the ISBA could complain about the order and that people who wanted to read the banned materials could not. It found that the appellants were challenging the order not as members of any group but in their capacity as citizens. It further held that citizens did possess locus standi to challenge the ministerial order’s alleged violation of a constitutional right:

If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen’s interest in seeing that his constitutional rights are not violated. A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.

There is thus no need for the appellants to show that they are office-holders in IBSA or members thereof. Their right to challenge Order 405/94 arises not from membership of any society. Their right arises from every citizen’s right to profess, practise and propagate his religious beliefs. If there was a breach of art 15, such a breach would affect the citizen *qua* citizen. If a citizen does not have sufficient interest to see that his constitutional rights are not violated, then it is hard to see who has⁶¹.

Procedure for Applying for Judicial Review

There is no singular uniform procedure in Singapore through which to seek remedies for administrative misfeasance or malfeasance.

The governing rule is Order 53 of the Rules of Court (RC) under which one cannot seek both private and public law remedies. The Singapore O53 is based on the old English O53. In 1978, English standing rules⁶² were liberalised and the new RC Order 53 introduced a new procedural regime — the application for judicial review (AJR) —under which both public and private law remedies can be sought. Previously private law remedies could only be sought through ordinary writ procedures which serve private law actions. Private law actions are not subject to such safeguards as the leave requirement which attends specialised public law remedies. The 1978 change was designed to eliminate the procedural obstacles to challenging administrative actions. Hence, Sinnathuray J noted in *Re Application by Dow Jones (Asia) Inc*⁶³ that “the English Order 53 is now a very different creature from its predecessor and likewise from our Order 53.” Lord Diplock, in discussing the difference between the old English O53 and the new one noted:

Before the new Order 53 was substituted for its predecessor, the private citizen who sought redress against a person or authority for acting unlawfully or *ultra vires* in the purported exercise of statutory powers had to choose from a number of different procedures that which was the most appropriate to furnish him the redress that he sought. The major difference in procedure, including *locus standi* to apply for the relief sought, were between the remedies by way of declaration or injunction obtainable by a civil action brought to enforce public law and the remedies by the way of the prerogative orders of mandamus, prohibition or certiorari which lay in public law alone...the main purpose of the new Order 53 was to sweep away these procedural differences...to substitute for them a single simplified procedure for obtaining all forms of relief⁶⁴.

⁶¹ [1996] 1 SLR 609 at 614C-F.

⁶² Rules of the Supreme Court O53 has been statutorily enacted in section 37, Supreme Court Act (1981).

⁶³ [1988] 1 MLJ 222 at 225F-G.

⁶⁴ *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 at 636.

Hence, in *Dow Jones* where the applicants applied for orders of certiorari and ancillary orders *i.e.* declaration, Sinnathuray J stated that “there is no provision in our substantive law or our rules of court relating to procedure for this court to make orders of declarations or give other ancillary reliefs in an application made under the (Singapore) Order 53.”⁶⁵ This approach was followed by the Court of Appeal in *Chan Hiang Leng, Colin v Minister for Information and the Arts*⁶⁶ where Karthigesu JA noted that there was never any power to grant a declaration under the old English O53 since it was not a prerogative order; the proper course would be to begin such an action by writ of originating summons: *O’Reilly v Mackman*⁶⁷. Hence, the appellants could not seek both declarations and certiorari under the O53 procedure. It made no difference that section 18(2) of the Supreme Court of Judicature Act (Cap. 322) confers upon the High Court the power to grant declarations. The High Court has the power to grant declarations but not under an O53 application. This displays a strict adherence to procedural formalism.

Subordinate Court

Subordinate courts are creatures of statute and are regulated under the Subordinate Courts Act (Cap. 321). Subordinate court judges do not enjoy security of tenure. These compose of 5 tribunals:

- (a) District Courts;
- (b) Magistrates’ Courts;
- (c) Juvenile Courts; (Part III, Children and Young Persons Act Cap. 38)
- (d) Coroners’ Courts;
- (e) Small Claims Tribunals.

District Court

A District Judge presides over a District Court. Its civil jurisdiction over tort or contract matters is \$250,000. In relation to matters of equity, this is \$3 million. Under section 11(3) of the Criminal Procedure Code (Cap. 68), the District Court in its exercise of criminal jurisdiction may impose imprisonment for a maximum term of 10 years; a fine not exceeding \$10,000; maximum 12 strokes of the cane and any other lawful sentence combining any of the sentences which it is authorised by law to pass, and reformatory training. Every District Court shall have in the exercise of its jurisdiction all the powers which belong to and are exercised by a Magistrate’s Court.

The High Court under section 185 of the Criminal Procedure Code has the power to transfer cases from a subordinate criminal court to the High Court, on various grounds such as when a fair trial cannot be had in a lower court, a difficult question of law is involved, or where such a transfer order is expedient for the ends of justice.

⁶⁵ [1988] 1 MLJ 222 at 225.

⁶⁶ [1996] 1 SLR 609 at 613B-C.

⁶⁷ [1982] 3 All ER 1124.

Magistrates Court

The Magistrates Court is presided over by Magistrates. Under the Subordinate Courts Act, the President may appoint, on the recommendation of the Chief Justice, any “fit and proper person” to be a magistrate.

The civil jurisdiction of the Magistrates court for civil matters is \$60,000. For criminal matters, section 11(5) of the Criminal Procedure Code empowers magistrates to impose terms of imprisonment of up to 2 years; fines not exceeding \$2000; a maximum of 6 strokes of the cane and any lawful sentence combining any of the sentences which it is authorised by law to pass.

Juvenile Courts

The Juvenile Courts are established under the Children and Young Persons Act (Cap. 38) and are presided over by a Magistrate nominated by the President.

In general, it has jurisdiction to try all offences which would be triable only by a Magistrate’s Court, a District Court or the High Court. The Magistrate is assisted by two advisers from a panel of advisers nominated by the President. A person who has attained the age of 16 years on the date of commencement of the hearing of the charge shall not be tried for any offence by a Juvenile Court.

The rationale for having a Juvenile Court is to secure to child offenders different treatment and to try to rehabilitate them through appropriate measures. A different approach is adopted. For example, section 41 of the Children and Young Persons Act provides that the words “conviction” and “sentence” shall cease to be used in relation to children and young persons dealt with by a Juvenile Court; the term to be adopted is a “finding of guilt.”

The presiding Magistrate, before deciding how to deal with a child, is empowered under section 42(9) to obtain “such information as to his family background, general conduct, home surroundings, school record, medical history and state of development, as may enable it to deal with the case in the best interests of the child or young person, and may put to him any question arising out of such information.”

The Juvenile Court, when a child or young person is charged and found guilty an offence warranting a fine and award of damages or costs, has the power under section 44 to discharge the offender, require a bond of good behaviour, commit the offender to the care of a specified fit person, order the parents or guardians to exercise proper care and guardianship, and impose a probation order, for example. Section 39(1) allows the Court to order the parent or guardian to pay the fine instead of the child, to give security for the child’s good behaviour. The Juvenile Court may call a family conference under section 45 to deal with a child or young person found guilty of an offence, during which the child may be reprimanded, administered a formal caution, required to pay compensation to or apologise to the victim of the offence or to perform a maximum of 240 hours of community service. It also has additional powers under section 51 to require the child or the parent to undergo counselling psychotherapy or other assessment and treatment or to partake in such activity as the Court thinks necessary for the purpose of (a) resolving any relationship problems between the child or young person and the parent or guardian thereof; (b) rehabilitating or assisting in the rehabilitation of the child or young person; (c)

enabling the parent or guardian of the child or young person to manage the child or young person; or (d) enhancing, promoting or protecting the physical, social and emotional well-being and safety of the child or young person.

Section 48 allows for an appeal to the High Court from the order of a Juvenile Court in accordance with the law in force which regulates appeals to the High Court from a Magistrate's Court.

Coroners Courts

A Coroner must have the same qualifications as a Magistrate. Coroners courts investigate enquiries into unnatural or institutional death. A Coroner may issue an order to a medical officer to undertake a post-mortem on the dead body where it is expedient under section 282 of the Criminal Procedure Code and may order the removal of the body to any place within his jurisdiction for this purpose.

Section 284 of the Criminal Procedure Act provides that the Coroner at every inquiry shall inquire the manner by which the deceased came to his death and whether any person is criminally concerned in causing this death. The Coroner is empowered to summon witnesses. The Coroner records his findings in writing and section 292 provides that if the Coroner is of the opinion at the close of any inquiry that there are "sufficient grounds" for charging a person under the Penal Code for causing or assisting in causing the death of the deceased, he may issue a warrant for the apprehension and committal of that person to prison to be brought before a court to be prosecuted according to law and he may bind over any witness examined before to give evidence before that court.

Family Court

The Family Court was established in 1995 to allow for the handling of all family matters in one forum. As a District Court, it comes under the charge of the Senior District Judge. It comprises the Family Court and Registry, the Family and Juvenile Justice Centre and the Family Court Support groups. The Family Court is a specialised forum where family members can seek legal redress for their family disputes, such as maintenance, protection orders, adoption and matrimonial causes in relation to divorce and nullity cases.

The Court describes its roles in protecting family obligations as an adjudicator of family disputes, a protector of children and victims of family violence, a provider and strategic coordinator of services for family litigants, a leader and innovator in family justice programmes and an educator on family justice issues and processes.⁶⁸ It is presided over by a District Judge and all parties are required to attend a mediation conference, for the purpose of identifying the issues and promoting a negotiated settlement of these issues. It also offers mediation and counselling as part of the case processes, to promote values of conciliation and co-operation, rather than contention.

Small Claims Tribunal

The Small Claims Tribunal was established in 1984 under the Small Claims Tribunals Act (Cap. 308). Its function is to provide an efficient method of dispute resolution in relation

⁶⁸ <http://www.familycourtofsg.gov.sg/philosophy/role.htm>

to claims arising out of contracts for goods and services or tortious claims for property damage which in general do not exceed the prescribed limit of \$10,000. Claimants conduct their own cases.

The Tribunal is presided over by a Referee appointed by the President on the recommendation of the Chief Justice who must be a qualified person within the meaning of the Legal Profession Act (Cap. 161). The primary function of the Tribunal is “to attempt to bring the parties to a dispute to an agreed settlement”: section 12(1). All records of the Tribunal are kept and recorded in the Registry of Small Claims Tribunals. Where it appears to the tribunal that it is impossible to reach an agreed settlement within a reasonable time, the tribunal shall determine the dispute “according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal forms or technicalities.” Tribunal proceedings are to be conducted in an informal manner and in private: section 22, 24. Section 35 empowers the tribunal to issue various orders, including ordering a party to the proceedings to pay money to the other party or to make a work order against any party to the proceedings. A right of appeal from the Tribunal with respect to questions of law lies to the High Court: section 38.

Syariah Court and Majlis Ugama Islam, Singapura

The Administration of Muslim Law Act (AMLA) (Cap. 3) introduces a dimension of legal pluralism by creating the Syariah Court with jurisdiction over Muslims in relation to their personal and customary laws, authorised by article 153 of the Constitution which provides for legislation to regulate Muslim religious affairs. This provision flows from the recognition in article 152(2) of the Constitution that the Malays as “indigenous people” enjoy a “special position”. Article 152(2) obliges the government to ‘promote their political, educational, religious, economic, social and cultural interests and the Malay language’.

Part III of the AMLA establishes the Syariah Court whose President and Registrar is appointed by the President of Singapore. The Court has jurisdiction over matrimonial and divorce related matters such as betrothal, nullity of marriage, disposition of property upon divorce, payment of maintenance or consolatory gifts. It may take evidence through the form of Muslim oaths and is generally not subject to judicial review proceedings. Part IX lists offences which are only applicable to Muslims such as cohabitation outside marriage (section 134) and enticing an unmarried woman from the *wali* or lawful guardian (section 135), breaches of which carry sentences of fines and imprisonment. Testamentary disposition is to accord with Muslim law (sections 111 and 112). An appeal from Syariah Court cases lies to the Appeal Board (Majlis Ugama Islam, Singapura) or Council of Muslim Religion, Singapore (Majlis). Members of the Majlis are selected by Muslim societies but the state is involved insofar as the Majlis President is also appointed by the President of Singapore, on the advice of the Cabinet. Such appointments may also be terminated in the public interest. The decision of the Majlis is final. Gender inegalitarian provisions in the AMLA such as permitting polygamy or apportioning larger inheritance shares to males is insulated from Singapore’s international obligations under the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) which it acceded to 1995, through reservations designed to protect the cultural autonomy of this minority group.

The Majlis also have a Legal Committee empowered to issue *fatwas* or rulings on a point of Muslim law, presumptively based on the *Shafi'i* school of law, of which a list of acceptable sources is contained in section 114.⁶⁹

Other Relevant Legal Departments

The office of the Attorney General is constitutionally established by article 35 which provides that the appointment to this office is made by the President acting in his discretion, where he concurs with the Prime Minister's advice. The Attorney-General must be a person who is qualified to hold an appointment as a Judge of the Supreme Court.

The Attorney-General enjoys tenure until the age of 60 and may be appointed for a specific period. During his continuance in office, the terms of service of the Attorney-General shall not be altered to his disadvantage. The Attorney-General may be removed from office where he is unable to discharge his office (from infirmity of body or mind) or for misbehaviour. The removal procedure is committed to the President acting in his discretion, where he concurs with the Prime Minister; the Prime Minister must not tender such advice except for the reasons stipulated above and with the concurrence of a tribunal consisting of the Chief Justice and 2 other Judges of the Supreme Court nominated for that purpose by the Chief Justice.

The Attorney-General is the principal legal advisor to the government and is assisted in this task by the Solicitors-General. Section 336(2) of the Criminal Procedure Code provides that the Solicitors-General also have all the powers of a Deputy Public Prosecutor and may act as the Public Prosecutor in the absence of the Attorney-General.

Article 35(7) of the Singapore Constitution provides that the Attorney-General is under the duty to "advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law". In his office as the Public Prosecutor, article 35(8) vests in the Attorney-General the discretion "to institute, conduct or discontinue any proceedings for any offence." All actions by or against the government are made in the name of the Attorney-General. He is constitutionally empowered to authorise reprints of the Constitution: article 155.

⁶⁹ These are (a) The English translation of the *Quaran*, by A. Yusuf Ali or Marmaduke Pickthall; (b) *Mohammedan Law*, by Syed Ameer Ali; (c) *Minhaj et Talibin* by Nawawi, translated by E. C. Howard from the French translation of Van den Berg; (d) *Digest of Moohummudan Law*, by Neil B. E. Baillie; (e) *Anglo-Muhammadan Law*, by Sir Roland Knyvet Wilson, 6th Edition Revised by A. Yusuf Ali; (f) *Outlines of Muhammadan Law*, by A. A. Fyzee; (g) *Muhammadan Law*, by F. B. Tyabji.