JUDICIAL INTERNALISING OF SINGAPORE'S
SUPREME POLITICAL IDEOLOGY

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Right from the beginning of Singapore's nationhood, an obvious and unbridgeable disconnect appeared – between its leadership's political ideology and the aspirations on human rights and constitutionalism of its legal community. Singapore's political leadership has spent much energy articulating a "pragmatic" ideology on political governance – placing primacy on economic progress, good governance and nation-building and emphasising a "communitarian" approach to human rights instead of individual rights. The political leadership's conception of the rule of law smacks of a "thin" one. The government religiously adheres to legal formalities, rather than substantive theories of political morality, to legitimise its actions, if primarily for the instrumental role of rule of law in economic prosperity. This article examines the government's response to the seminal Court of Appeal case of Chng Suan Tze v Minister of Home Affairs, where the government's immediate and hard-hitting constitutional and legislative amendments – overruling the court's decision on a preventive detention case – clearly demonstrated its intent to ensure that the Singapore judiciary accept its limited role and that the judiciary accept a concept of the rule of law which should not be substantially different from that understood and accepted by the political leadership. This article examines in detail how the Singapore judiciary's acceptance of the government's "thin" conception of the rule of law has a direct bearing on the approach taken towards constitutional adjudication in Singapore.

* Associate Professor, Faculty of Law, National University of Singapore. The analysis of the jurisprudence of constitutional adjudication in Singapore is confined to the process of judicial decision-making and the extent of explicit or apparent judicial reasoning in the relevant judgments. This article does not make any reference to, or cast any aspersions on, the personal character of anyone. It does not make any imputation or insinuation of any motives to any member of the Singapore judiciary or anyone taking part in the administration of justice in Singapore. Neither does it impugn the integrity, propriety, impartiality, independence of the Singapore judiciary or the administration of justice in Singapore. The author is grateful to Colin Seow for excellent research assistance.
Introduction

Pragmatism and Communitarianism in Singapore

Singapore was founded by the British in 1819. It achieved internal self-government in 1959 and became a State of the Federation of Malaysia in 1963 before its secession from the Federation of Malaysia in 1965. The ruling political party in Singapore – the People's Action Party (PAP) – has maintained continuous hegemonic governance and political dominance since internal self-government was introduced. 1 It has expended much effort articulating its pragmatic brand of political ideology, 2 placing primacy on economic progress, social and political stability and nation-building. Communitarian values 3 subordinating individual rights to collective interests are advocated and enshrined in the White Paper on Shared Values. 4

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1 Active opposition political parties are few in numbers and have had an almost irrelevant existence. J. B. Jeyaretnam became the first opposition member of parliament in 15 years (after 1965) when he won a 1981 by-election. In Singapore’s four decades of nationhood, the opposition parties have not occupied more than four parliamentary seats (in the 1991 parliamentary general election). At the last parliamentary general election in May 2006, the PAP won a 12th consecutive term in office – winning an impressive 66.6 per cent of the overall votes and 82 out of a total of 84 parliamentary seats – showing neither sign nor hint of any weakening of its total grip and entrenched hold on political power in Singapore. Recently, Parliament has announced plans for changes to the electoral system such that there would be an increased opposition presence in Parliament: see “Parliamentary Elections Act: Key changes” The Straits Times, 28 April 2010 (Factiva); “Balancing a strong govt and a diversity of voices” The Straits Times, 28 April 2010 (Factiva); “Concerns over plan to increase opposition presence” The Straits Times, 27 April 2010 (Factiva).


4 Shared Values White Paper (Cmd 1 of 1991) (Singapore). The five core values highlighted are: nation before community and society above self; family as the basic unit of society; regard and community support for the individual; consensus instead of contention; and racial and religious harmony.
The development of such an ideology can be traced to the formative years of the PAP. From the outset, the PAP was “a marriage ... of temporary political convenience”, born in 1954 out of the struggle for independence from the British. The PAP then consisted of the left-wing nationalist grass-roots organisations and the moderate, English-educated middle class comprising Lee Kuan Yew and company who would later come into dominant power within the PAP itself, as well as in Singapore. The leftist members were accepted in order to harness their capacity for mobilising mass electoral support, through their grass-roots organisations. This pragmatic approach to the PAP’s earliest formation was to shape the party’s future political ideology.

In 1961, the leftist faction within the PAP broke away due to an internal rift and formed the Barisan Sosialis. This resulted in the PAP losing most of the vast grass-roots organisational structures and community leadership that had been so important to their electoral success in 1959. The PAP’s response was to intimidate its opponents, and to dismantle their social and organisational bases within civil society. The most dramatic instance of this was a particular operation called “Operation Cold Store”. In this particular operation in 1963, a large number of opposition leaders were arrested by the Special Branch under the Internal Security Act, which allowed for detention without trial. This decimated the opposition in Singapore, allowing the PAP to further consolidate its political power.

When Singapore became independent in 1965 upon secession from Malaysia, it faced riotous social conditions, and a bleak economic future. Then Prime Minister Lee Kuan Yew explained that his main priority was to lift Singapore “out of the degradation that poverty, ignorance and disease had wrought”, and all other matters became secondary.

This ideology of survival was refined in the 1970s when the Socialist International, of which the PAP was a member, accused the PAP of losing its democratic and socialist ideals. In response, the PAP resigned from the organisation.

This left an ideological vacuum which the PAP managed to fill by tapping the ideology of “Asian” values – essentially a selective reading of Chinese values and Confucian ethics, embodying (1) deference to authority; (2) pursuit of education; (3) diligence; and (4) family and

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6 Ibid. p 5.
state-oriented social networks. The mantra of “Asian” values was adopted as a direct challenge to western ethno-centric imposition of a rights-oriented ideology. It was meant as a measure to curb the influence of western individualist values. Further, the concept of “Asian” values was able to provide a common, overlapping consensus between the various religious and ethnic groups in Singapore. This was critical for maintaining racial harmony in Singapore, which was given high importance, after the lessons from the 1964 race riots. In contrast, western liberal ideology was seen to be “characterised by institutionalised friction and conflict”.

The imposition of “Asian” values was, in itself, a pragmatic response to achieve a communitarian good. It served as a replacement for western liberal ideology, which was deemed by the PAP as a threat to its political dominance, and thus the survival of Singapore as a nation. The PAP perceived any challenge to their authority as a needless discourse which would detract the government from implementing efficient policies for the good of the community. Therefore, the “Asian” values, with its focus on deference to authority and community above self, were ideal values for promulgation.

However, the importation of Asian values has been seen as artificial and selective; certain Confucianist values like obedience to authority were emphasised, while other values like validity of criticism against evil governments were conveniently neglected. The insistence on Confucianism as a basis for “Asian” values is flawed, and exhibits an attempt by the PAP to create a hegemonic state that is submissive to its aims which are, supposedly, reflective of the people's needs and desires.

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9 Ibid.
10 Thio Li-Ann, “An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication” (1997) 27 HKLJ 152, 154 and 157–158. In sum, Asian societies are duty-oriented, exhibit deferential attitudes towards authority, value social conformity, harmony, and order above individual autonomy, and thereby accord priority to group interests. Conversely, Western society must be rights-oriented and individualistic with an adversarial attitude towards those in authority.
12 On 21 July 1964, a large group of ethnic Malays gathered at the Padang to celebrate Prophet Muhammad's birthday. As part of the celebrations, the Malay procession proceeded to Geylang. Along the way, a policeman asked a group, who had separated from the main group, to rejoin the main procession. This sparked off the July 1964 race riots. On 3 September 1964, a Malay trishaw rider was found murdered and the murderers were believed to be a group of ethnic Chinese. This sparked off the second racial riots.
13 See n 5 above, p 17.
14 J. B. Jeyaretnam, “The Rule of Law in Singapore” in The Rule of Law and Human Rights in Malaysia and Singapore: a Report of the Conference held at the European Parliament, 9 & 10 March 1989 (Limelette, Belgium: KEHMA-S, 1989), p 38. The writer observed that the Singapore government concentrated on Confucian values that emphasise deference to authority while carefully ignoring concepts stating that the people not only have a right, but the duty, to protest against a government or authority that is unjust or evil.
The emphasis placed on communitarian values over individual rights was justified on the basis that “Asian” values were applicable to Singapore, and superior to western liberal ideology. Any argument based on liberal western ideology was shot down as non-Asian, and therefore not applicable. The successful entrenchment of “Asian” values in Singapore society was partly due to the economic success that Singapore achieved from the 1970s to the 1990s. In 1997, the economic crisis brought down the myth of the superiority of the “Asian” values ideology, which came crashing down with the revelation that countries subscribing to it were as vulnerable to corruption and economic disasters as their western counterparts.\textsuperscript{15}

As a result, Singapore started to shift its ideological focus towards notions of civic engagement that favoured non-competitive politics.\textsuperscript{16} In practice, this was simply a reorientation of the “Asian” values ideology to place greater emphasis on communitarian and non-competitive values.

**The Judicial-executive Nexus**

Rights adjudication invariably involves a balancing of competing collective and individual interests. To a certain extent, this process is tainted by the ideology of the government, given that collective interests are defined by the government. A communitarian ideology is not in itself detrimental to the proper functioning of society.

The danger arises when “government-articulated collective interests in the name of culture and community becomes synonymous with state interests”.\textsuperscript{17} When this happens, any criticism of the government, even constructive ones, becomes criticism subversive of the state and hence the community's interest. The system becomes open to abuse by governments seeking to strengthen their political power and legitimise their actions via legal formalities within a “thin” conception of the rule of law.\textsuperscript{18}

Therefore, the judiciary plays a critical role in ensuring that the excesses of the executive are kept in check. It is up to the judiciary, as the authoritative interpreter of the Constitution, to safeguard and give

\textsuperscript{15} See n 5 above, p 17.
\textsuperscript{16} Ibid.
\textsuperscript{17} Thio (n 10 above), p 155.
effect to those immutable values deemed important enough to be written into a bill of rights.\(^{19}\)

Notwithstanding the principle of separation of powers, it seems difficult – on the surface – to argue against the allegation that the Singapore judiciary can hardly be said to be independent of the executive. All appointments to judicial positions in the Supreme Court are made by the President on the advice of the Prime Minister.\(^{20}\) This effectively means that the power of appointment vests in the Prime Minister, albeit with a Presidential veto. Retiring judges may have their appointments extended on contract at the discretion of the Prime Minister.\(^{21}\) Temporary appointments of judicial commissioners, which are similarly subject to executive discretion,\(^ {22}\) allow a person to exercise the functions of a Supreme Court judge without possessing full security of tenure.\(^ {23}\) Unsurprisingly, appointees to the Supreme Court have often had a background in the Attorney-General Chambers or some formal or informal affiliation with the PAP.\(^ {24}\) In addition, the salaries of Supreme Court judges are determined by the executive, rather than by the legislature or an independent tribunal.\(^ {25}\)

The subordinate courts are staffed with officers from the Singapore Legal Service, who typically sit as district judges or magistrates as part of a route of advancement in their careers.\(^ {26}\) Among them, few are retained in judicial positions for long periods, resulting in a lower judiciary that seems more like an extension of the executive, than a professional and independent body.\(^ {27}\) Unlike Supreme Court judges, subordinate court judges do not enjoy security of tenure, thus exposing them to the risk of dismissals or transfers at the whim of the executive.

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\(^{19}\) The role of the judiciary can be said to be more crucial in Singapore’s political context than in other nations generally, for it is noted that Singapore lacks a bicameral system of government and there has always been an overwhelming controlling majority of the seats in Parliament by the People’s Action Party (PAP). Such a controlling majority which far exceeds two-thirds of the total number of seats in Parliament allows the ruling PAP to amend any fundamental liberties enumerated in Part IV of the Constitution of Singapore with relative ease, pursuant to Art 5 of the Constitution which provides that “[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 the elected Members of Parliament”. Art 8 of the Constitution which entrenches provisions in the Constitution does not apply to Part IV of the Constitution.


\(^{25}\) Judges’ Remuneration Act (Cap 147, 1995 Rev Ed Sing), s 2(1).

\(^{26}\) See n 24 above, pp 496–497.

\(^{27}\) Ibid.
In 1986, for instance, senior district judge Michael Khoo was abruptly transferred to the Attorney-General’s Chambers following his acquittal of opposition leader Joshua Benjamin Jeyaretnam of all politically inspired charges but one. This incident triggered a chain of events which would, in 1994, ultimately lead to the abolition of appeals to the Privy Council – Singapore’s then ultimate court of appeal, which the Prime Minister had earlier praised as “the acme of Singapore’s judicial independence”. Thus, ended any external review of decisions laid down by the Singapore courts.

The Singapore judiciary itself has also had its powers of judicial review curtailed by legislation – an overt exercise of executive control over the judiciary. Recognising its role in ensuring that the constitutional right of liberty is derogated from as little as possible, the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* quashed an order issued under the *Internal Security Act* for the preventive detention of persons alleged to be involved in an alleged Marxist conspiracy. Relying on decisions from several foreign jurisdictions, the court held that ministerial discretion in issuing detention orders was subject to an objective test of review.

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29 See Seow (ibid): Jeyaretnam alleged in Parliament that Khoo’s transfer had been politically motivated, sparking a heated debate in which it was revealed that the transfer had not merely been a “routine departmental transfer”, contrary to the Prime Minister’s initial claim. This resulted in Jeyaretnam’s expulsion from Parliament and disbarment from law practice. He appealed to the Privy Council, which allowed the appeal and castigated the Singapore courts for their legal reasoning. Appeals to the Privy Council were subsequently abolished on the basis that the Privy Council had overstepped its boundaries in engaging in domestic politics and was “out of touch” with local conditions. See also n 254 above, p 502.
30 *Chng Suan Tze v Minister for Home Affairs* [1988] SLR 132.
31 *Internal Security Act* (Cap 143, 1985 Rev Ed Sing); a statute that allows preventive detention.
32 *Chng Suan Tze* (n 30 above), pp 149E–156G.
The executive reacted swiftly. Constitutional and legislative amendments were passed immediately to effect changes to the Internal Security Act, and restored the test to a subjective one. The Minister for Law, in moving the constitutional amendment, indicated very strongly that this judicial misadventure had resulted from inappropriate references to foreign precedents, and overstepped the boundaries of legitimate judicial authority:

"First, Sir ... if we allow foreign case law and precedents to allow our courts to be involved in an interventionist role, then we will have an untenable position – clearly an untenable position – because our law on national security matters will be governed by cases decided abroad, in countries where conditions are totally different from ours ... Second reason, Sir ... is that if Singapore courts are allowed, because of all these foreign precedents, to review the discretion of the Executive on security matters, as expounded in the Court of Appeal judgment, then Singapore judges will in effect become responsible for and answerable to decisions affecting national security of Singapore because they would then have the final say ... Our courts, Sir, should not therefore be involved in the exercise of these powers of detention".  

33 See Constitution of the Republic of Singapore (Amendment) Act 1989 (No 1 of 1989), cl 3:  
"3. Article 149 of the Constitution of the Republic of Singapore is amended—  
(a) by inserting, immediately after the word "action" in the sixteenth line of clause (1), the words "or any amendment to that law or any provision in any law enacted under the provisions of clause (3)";  
(b) by inserting, immediately after the words "Art 9," in the seventeenth line of clause (1), the words "11, 12,;" and  
(c) by inserting, immediately after clause (2), the following clause:  
"(3) If, in respect of any proceedings whether instituted before or after the commencement of this clause, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Art 93 shall invalidate any law enacted pursuant to this clause"."

34 Internal Security (Amendment) Act 1989 (No 2 of 1989), introducing the new s 8B(2) that states:  
"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 Internal Security Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision".  
The explanatory note for the Internal Security (Amendment) Act 1989 (No 2 of 1989) states:  
"An Act, made pursuant to Article 149(3) of the Constitution of the Republic of Singapore, to re-state the law applicable to judicial review of decisions made and acts done under the Internal Security Act (Chapter 143 of the 1985 Revised Edition) and to amend the said Internal Security Act and to provide for the Court of Appeal to be the final court in respect of all proceedings arising out of actions relating to internal security and questions of interpretation of the provisions of Part XII of the Constitution and any law made thereunder".  

The above statement by the Minister foreshadowed a marked shift in judicial reasoning and attitudes, towards an excessive deference to the government, and its supreme political ideology. In practice, the PAP’s pragmatism and communitarianism translate into a focus on crime control at the expense of due process, and the pursuit of socio-economic rights to the exclusion of civil-political liberties.

This article examines how the Singapore judiciary has abdicated its role as guardian of individual liberties and a check on state power. An analysis of Singapore’s post-1980s jurisprudence reveals it as a jurisprudence that is informed by state objectives of order and prosperity. Instead of affording individual rights the maximum protection possible, the judiciary has consistently whittled down both criminal and civil-political rights, either by interpreting constitutional provisions in a narrow and formalistic manner, or by expanding various restrictions on rights so far and so extensive as to render those rights meaningless. At the heart of such reverse judicialisation is a hegemonic culture in which the judiciary has internalised, and now espouses, the political leadership’s communitarian and pragmatic ideology.

Criminal Rights

The political landscape in Singapore had a great impact on the development of the criminal law, as can be seen from how Singapore’s criminal process\(^{36}\) model eventually evolved to reflect the political leadership’s pragmatic and communitarian ideology. A state’s criminal process model can be conveniently evaluated by locating it on a spectrum with the Crime Control Model and the Due Process Model, as formulated by Herbert Packer, at the two extremes.\(^{37}\)

The Crime Control Model places primacy on efficacious suppression of crime.\(^{38}\) Central to the Crime Control Model is a high degree of trust in the reliability of the fact-finding and screening processes operated by the police and prosecutors.\(^{39}\) This justifies the minimisation of restrictions on such administrative processes, as well as the truncation

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\(^{36}\) The criminal process refers to “the complexes of activity that operate to bring the substantive law of crime to bear (or to keep it from coming to bear) on persons who are suspected of having committed crimes”: Herbert Packer, *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968), p 149. See also Chan Sek Keong, “The Tenth Singapore Law Review Lecture 1996: The Criminal Process – The Singapore model” (1996) 17 Sing L Rev 432, 437 for the various stages of the criminal process.

\(^{37}\) Packer (ibid), pp 149–173.

\(^{38}\) Ibid, p 158.

\(^{39}\) Ibid, pp 160, 163.
of subsequent stages in the criminal process, which are regarded as relatively unimportant.40

The Due Process Model, on the other hand, shows a much more generous acknowledgement of human frailty and error in the criminal process.41 It embraces the concept of due process – a principle that generates specific rights and procedures, ensuring fairness to individual accused persons in the dispensing of justice in society.42 The focus is thus on the trial stage, or:

“formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him”.43

The Crime Control and Due Process Models disagree as to how much reliability should be compromised for efficiency, where reliability refers to “a high degree of probability in each case that factual guilt has been accurately determined”.44 While the Crime Control Model is more tolerant of errors, and concerned with reliability only to the extent that it impedes efficiency, the Due Process Model seeks to prevent errors to the greatest extent possible.45 Accordingly, the Due Process Model subjects the criminal process to various safeguards which inevitably reduce efficiency.46

Nevertheless, the two models are not mutually exclusive, but rather share some similarities – or “Common Grounds”.47 This demonstrates the point that crime control and due process cannot realistically be pursued separately in a vacuum. Although Singapore’s criminal process model is supposedly one “incorporating many features from both

40 Ibid. p 162.
41 Ibid. p 163.
43 Packer (n 36 above), pp 163–164.
44 Ibid. p 164.
46 Ibid. p 166.
47 The "Common Grounds" enunciated in ibid. pp 155–157 are as follows:
(1) The function of defining criminal conduct is separate from and prior to the process of identifying and dealing with persons as criminals.
(2) There are limits to the powers of government to investigate and apprehend persons suspected of committing crimes.
(3) Alleged criminals are not merely objects to be acted upon but independent entities in the criminal process who may, if they so desire, force the operators of the process to demonstrate to an independent authority (judge and/or jury) that he is guilty of the charges against him.
of Packer’s models”, in practice it seems to resemble more closely the Crime Control Model with its goal of “a high rate of conviction of the factually guilty accused”. While it is perfectly legitimate for crime control to be high up on the government’s agenda, this should never be at the expense of due process. Singapore must guard against leaning so far towards the Crime Control Model that due process exists only in form, but not in substance. Unfortunately, as this section shows, it seems that the Singapore Crime Control Model is treading dangerously in this very direction.

**Self-imposed Limitations on Judicial Review**

Article 9(1) of the Constitution protects the sanctity of life and the primacy of personal liberty. It stipulates: “No person shall be deprived of his life or personal liberty save in accordance with law”. Due to the open-textured words of “personal liberty” and “law”, there is considerable scope for judicial interpretation of this provision. The strength of the protection afforded to individuals depends, to a considerable extent, on the approach adopted in constitutional interpretation. Generally, when interpreting Part IV of the Constitution which enshrines fundamental liberties, a generous interpretation should be taken to give individuals the full measure of these liberties.

Article 2(1) of the Constitution defines “law” 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”.

In Ong Ah Chuan v Public Prosecutor, Lord Diplock further clarified that “law” in this context included the “fundamental rules of natural justice” forming part of the English common law operating in Singapore at the

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48 See Chan (n 36 above), p 443 for the various stages of the criminal process.

49 Ibid. p 442.


53 Ong Ah Chuan (n 51 above), pp 611-62A.
commencement of the Constitution. Such an interpretation would better protect the fundamental liberties of individuals, by subjecting legislation to procedural and substantive tests of fairness.

The purposive approach in Ong Ah Chuan gave way to a literalist approach in the 1990s. In Jabar v Public Prosecutor, the issue was whether a prolonged delay in the execution of a death sentence contravened Article 9(1) of the Constitution, in so far as prolonged imprisonment on death row amounted to cruel and inhuman treatment, and was therefore not “in accordance with law”. Defence counsel relied on several Indian cases which had held that a long and undue delay in the execution of a death sentence could amount to a breach of Article 21 of the Indian Constitution. Article 21 corresponds to Article 9(1) of the Singapore Constitution in stipulating that “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

Despite the similarity in wording of the provisions, the Court of Appeal rejected the trial judge’s finding that the two provisions were in pari materia. India’s Article 21 had been construed broadly to require laws depriving life or liberty to be fair, just and reasonable, to enable the articulation of implicit rights, and to apply at all stages of the criminal process. Accordingly, the trial judge in Jabar held that Article 9(1) required all substantive and procedural laws to be complied with throughout the whole criminal process from investigation, arrest, trial, appeal and up to the execution of the sentence.

The Court of Appeal, however, held that India’s Article 21 and Singapore’s Article 9(1) were materially different, without elaborating on the significance of the slight difference in wording. If anything, Article 9(1) could be construed even more broadly than Article 21 to extend to substantive, in addition to procedural, matters. Instead of elaborating on the abstract concept of “law” in such a manner as to afford individuals maximum protection of their rights, the court adopted a narrow reading of Article 9(1). It held that unlike Article 21 of the Indian Constitution, Article 9(1) did not confer on courts the jurisdiction to

54 The Constitution came into force on 16 September 1963.
55 Jabar v Public Prosecutor [1995] 1 SLR 617, 631B.
56 Ibid. p 626H.
57 Ibid. pp 627A–629H.
58 In fact, the Singapore Constitution was derived from the Malaysian Constitution, which was in turn modelled upon the Indian Constitution: Thio Li-Ann, “Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?” [1997] S JLS 240, 284.
59 Jabar (n 55 above), pp 627G–628H.
60 Ibid. p 626D.
61 Ibid. p 631B.
62 Thio (n 58 above), p 280.
ensure constitutional validity of the execution of the death sentence, but only to ensure constitutional validity up to the passing of the sentence, where the judicial process concludes. The court went further to state:

"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."

Such a narrow approach is in stark contrast to the court’s rejection in Ong Ah Chuan of the Public Prosecutor’s argument that “law” in Article 9(1) merely referred to any Act of Parliament, however arbitrary or contrary to fundamental rules of natural justice the Act might be. In refusing to interpret “law” as encompassing substantive notions of fairness, justice and humanity, the court in Jaber limited its role to ascertaining if a law derogating from fundamental liberties was properly enacted. This amounts to an abdication of judicial function in ensuring due process, both substantive and procedural. If what is “in accordance with law” is simply whatever Parliament enacts, then judicial review no longer serves as a meaningful check on legislative power, thereby defeating the purpose of having a bill of rights in the first place.

Refusal to Recognise Implicit Rights

A generous and purposive interpretation would not restrict the ambit of fundamental liberties to the explicit text of their constitutional provisions, but rather construe fundamental liberties as “composite bundle[s]” of implicit rights waiting to be articulated on an incremental basis. This has largely been the approach adopted in India. For instance, with respect to the right to life and liberty protected by Article 21 of the Indian Constitution, the court in Sher Singh v State of Punjab commented:

"The horizons of art 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty

63 Jaber (n 55 above), p 631.
64 Ong Ah Chuan (n 51 above), p 61E–F
65 Thio (n 58 above), p 283.
66 Ibid. p 261.
67 This corresponds to Art 9(1) of the Singapore Constitution, whose roots can ultimately be traced to the Indian Constitution.
and endeavour of this court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation.\footnote{Sher Singh v State of Punjab [1983] 2 SCR 582, para 20.}

Meanwhile, according to Maneka Gandhi v Union of India, a right which was not specifically named in any constitutional provision might nevertheless be a constitutional right if it was an integral part of, or of the same nature as, a named fundamental liberty.\footnote{Maneka Gandhi v Union of India [1978] 2 SCR 621, para 80.}

In Singapore itself, such a broad approach may also be seen in Haw Tua Tau v Public Prosecutor,\footnote{Haw Tua Tau v Public Prosecutor [1980–1981] SLR 73, 761.} where the Privy Council declined to attempt to comprehensively list the fundamental rules of natural justice\footnote{Ong Ah Chuan (n 51 above), pp 611–62A.} applicable to the criminal process. This effectively left open the concept of “law” in Article 9(1) of the Constitution, and opened the door for the Singapore judiciary to articulate specific, implicit rights supporting the broader right to life and liberty. Given the unequal position of the individual vis-à-vis the state, it is justifiable for the Singapore judiciary to adopt a “presumptive bias in the individual’s favour” in constitutional interpretation.\footnote{This (n 58 above), p 233.}

Unfortunately, subsequent cases have detracted from the generous approach in Haw Tua Tau, showing a rigid adherence to the constitutional text and a general reluctance to articulate implicit rights.

Curtailing Right to Silence
In Public Prosecutor v Mazlan bin Maidun, the Singapore Court of Criminal Appeal held that a failure to inform an accused of his right to remain silent did not constitute a breach of his constitutional rights under Article 9(1) of the Constitution.\footnote{Public Prosecutor v Mazlan bin Maidun [1993] 1 SLR 512, 520.] There were four factors supporting the court’s decision.

First, the court emphasised the fact that the right of silence, or the privilege against self-incrimination, had not been expressly written into the Constitution as a fundamental liberty:

“Article 9(1) of the Constitution does not in fact refer to a ‘right of silence’ or a ‘privilege against self-incrimination’. Indeed there is no specific constitutional or statutory provision protecting such a ‘right’ or such a ‘privilege’… To say that the right of silence is a constitutional right would be to elevate an evidential rule to constitutional status despite its having been given no
explicit expression in the Constitution ... In our opinion, this [right] would have been given specific Parliamentary expression if the legislature had intended to guarantee full protection for it ...”

Such rigid and literal adherence to the constitutional text is undesirable, for the lack of an express provision does not entail that there is no constitutional right of silence. As Ong Ah Chuan and Haw Tua Tau have established, Article 9(1) is wide enough in scope to encompass more specific, implicit rights other than the right to life and liberty. In fact, given the open-endedness of “in accordance with law”, the articulation of implicit rights may be part and parcel of interpreting Article 9(1). That the court in Mazlan frowned upon such articulation as “adventurous extrapolation” is indicative of its allegiance to the letter rather than the spirit of the law.

In fact, the court in Mazlan seemed to have recognised the possibility of Article 9(1) encompassing an implicit right to silence. However, the court summarily dismissed this possibility, declaring that the right to silence had “never been regarded as subsumed under the principles of natural justice” protected by Article 9(1). This had the drastic effect of preventing the entire right to silence from being recognised constitutionally, even though the right is multi-faceted, and the issue at hand concerned only one aspect of it – namely, the more specific right to be informed of the right to silence.

A possible fallout from this pronouncement is that other existing rules that are based on the right would not be taken seriously, thereby undermining fairness to the accused.

In Haw Tua Tau, the Privy Council had deliberately left open the question of whether the right to silence constituted a fundamental rule of natural justice, stating that the answer to that depended on whether:

“the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would be regarded there by lawyers as having evolved into

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74 Ibid. pp 515l, 516C, 516H.
75 Ibid. p 516D.
76 Ibid. p 516C.
77 After Ong Ah Chuan (n 51 above), the words “in accordance with law” in Art 9(1) have been interpreted to include fundamental rules of natural justice.
78 Michael Hor, “The Privilege against Self-Incrimination and Fairness to the Accused” [1993] SJLS 35, 44.
79 Mazlan (n 73 above), p 514G.
80 See n 78 above, p 44.
a fundamental rule of natural justice by 1963 when the Constitution came into force.”

Thus, it was not at all self-evident that the right to silence could not potentially be a principle of natural justice. The issue of whether the right to silence is a fundamental rule of natural justice should not have been dismissed without a proper consideration of its multi-faceted nature, and its significance in the entire criminal process. The literalist approach in Mazlan did not make for the development of a cogent and reasoned constitutional jurisprudence.

Secondly, the court pointed out that the right to silence originated as an evidential rule, and should thus not be elevated to constitutional status. This is a fallacy; there is no reason why an evidential rule cannot be a fundamental rule of natural justice. For instance, the presumption of innocence, which is an evidential rule, is an undoubted fundamental rule of natural justice.

Thirdly, the court asserted that the right of silence protected the accused from self-incrimination, arising from improper force being applied by the authorities. It was the court’s view that this interest had been adequately protected by the development of rules of evidence and criminal procedure. But as Hor has pointed out, the current statutory provisions do not provide adequate safeguards against the risk of unreliable confessions extracted by force.

Lastly, the court noted that ss 122(6) and 123(1) of the Criminal Procedure Code expressly derogated from the right to silence and yet were held to be constitutional by the Privy Council in Sundram Jayakumar v Public Prosecutor. This was used as further support for the conclusion that there was no constitutional right of silence. However, such reasoning is flawed. It is a mistaken assumption that the provisions derogate from the right to silence. In Jayakumar itself, the Privy Council applied the reasoning in How Tua Tau that the provisions did not create a genuine compulsion on, but only a strong inducement to, an accused to give

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81 How Tua Tau (n 70 above), pp 81F–G, 82F.
82 See n 78 above, p 47. In How Tua Tau (n 70 above), p 82A, the Privy Council commented: “in considering whether a particular practice adopted by a court of law offends against a fundamental rule of natural justice, that practice must not be looked at in isolation but in the light of the part which it plays in the complete judicial process”.
83 Mazlan (n 73 above), p 516C.
84 See n 78 above, p 47.
85 Mazlan (n 73 above), p 516E–516F.
86 See n 78 above, p 48.
87 (Cap 68, 1985 Rev Ed Sing).
89 Mazlan (n 73 above), pp 5161–517D.
evidence. In other words, the provisions did not infringe upon the right to silence and there was no need to decide if it was a constitutional right. Thus, Jaykumal is not an appropriate authority for the court’s assertion in Mazlan. The ready acceptance of Jaykumal without any proper analysis of the reasoning behind it is regrettable.

Curtailing Right to Counsel

Rajeevan Edakalavan v Public Prosecutor92 concerned a petition for the revision of a conviction for the use of criminal force with an intent to outrage modesty. It was contended that a miscarriage of justice had occurred due to, inter alia, the fact that the petitioner had not been informed of his right to counsel before he pleaded guilty. The right to counsel is provided by Article 9(3) of the Constitution, which stipulates:

"Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".93

Yong CJ considered two foreign authorities:94 the Privy Council decision in Attorney General of Trinidad and Tobago v Whiteman,95 and the United States Supreme Court decision in Miranda v Arizona.96 In both cases, it was held that a person upon arrest had a constitutional right to be informed of his right to counsel. The relevant provisions of the Constitution of Trinidad and Tobago read:

"5(2) Without prejudice to subsection (1), Parliament may not –

... (c) deprive a person who has been arrested or detained –

... (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him

... (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms"

92 See n 88 above. See also Haw Tua Tau (n 70 above), p 82G–H.
91 Haw Tua Tau (n 70 above), p 81F–G.
92 Rajeevan Edakalavan v Public Prosecutor [1998] 1 SLR 815. See also Soong Hee Sin v PP [2001] 2 SLR 253 where Yong CJ reiterated his position in Rajeevan.
94 Rajeevan (n 92 above), paras 15–16.
While conceding that s 5(2)(c)(ii) was worded similarly to Article 9(3) of the Singapore Constitution, Yong CJ distinguished Whiteman on the basis that the Singapore Constitution had no equivalent of s 5(2)(h). Miranda was distinguished because it related to the protection of the privilege against self-incrimination, rather than the protection of the constitutional right to counsel.

The absence in the Singapore Constitution of an explicit provision like s 5(2)(c)(ii) would not have been so material a difference, had the court read into the right to counsel an additional right to be so informed. However, the court adhered rigidly to the text of Article 9(3), citing the words “shall be allowed” to justify construing the right to counsel as a negative right – one which merely prohibited actions infringing upon it, but which did not require positive actions facilitating its exercise.97 Further, the court emphasised that “nowhere in Article 9(3) does it provide that there is a further right to be informed of one’s right to counsel”.98

Such an approach can be criticised for being formalistic and non-rigorous. The point is not that the court should have recognised an implicit right which it did not, but rather that it declined to even consider the possibility of recognising such an implicit right. Instead of seeking to construe the ambit of a constitutional provision as broadly as possible, the court restricted its own role as protector of fundamental liberties, declaring the enumeration of implicit rights to be “tantamount to judicial legislation”.99 This detracts from the broad, purposive approach enabled by Haw Tua Taw. To say that there was no explicit right to be informed of the right to counsel is no answer to the question of why a right to counsel did not imply a supporting right to be so informed.

Similarly, stating that a judge was “in no position to expand the scope of or imply into the Constitution ... his own interpretation of the provisions which is clearly contrary to parliament's intention”,100 in no way shows how recognising an implicit right to be informed would have contradicted Parliament's intention to protect the right to counsel. Granted, the court attempted to justify its decision as follows:

“There has been criticism that to deprive one of the right to be informed will effectively amount to a negation of the right to counsel itself. In my opinion, that is pushing the case too far. The practical experiences in our judicial system bear testimony to the fact that such a conclusion is wholly

97 Rajeevan (n 92 above), para 19.
98 Ibid.
99 Ibid.
100 Ibid.
speculative and unwarranted. Conversely, the safeguards in the Constitution and the criminal procedure process ensure that the rights of the accused are adequately protected".101

However, such reasoning, being comprised of unsupported assertions, is unpersuasive. Clearly, the right to counsel can only be exercised by one who is aware of it. After all, the petitioner in Rajeevan, who was not advised of his right to counsel, had failed to reap the benefits of exercising such a right, including obtaining advice on the defences, or other options, open to him.102 Nevertheless, his plea of guilt was accepted as valid, and the petition for criminal revision was dismissed.103 Surely, Parliament could not have intended for the right to benefit only the select few who happened to know of it beforehand, for ignorance does not warrant discrimination. In order for the right to counsel to be meaningful, it must imply a supporting right to be so informed.

Given the court's strict textualism in Rajeevan, one might have supposed that the right to counsel would be interpreted as arising immediately upon a person's arrest. After all, Article 9(3) of the Constitution stipulates that "Where a person is arrested", he shall be allowed access to counsel. Nowhere in Article 9(3) does it provide that this right is qualified in any way.

Yet an extra-textual qualification of the right was read into Article 9(3) in Jasbir Singh v Public Prosecutor,104 restricting, instead of expanding, an accused's rights. There, Yong CJ held that one's right to counsel only arose within a reasonable time after his arrest.105 The accused, having been charged with drug trafficking, was allowed access to counsel only two weeks after his arrest. This was found to be a reasonable period of time on the facts of the case, notwithstanding the fact that a cautioned statement had been recorded from the accused pursuant to s 122(6) of the Criminal Procedure Code106 without him having been advised by any counsel.107 No test for reasonableness was set out other than a vague reference to "allowance for police investigations and procedure";108 nor was there further elaboration on why the two weeks' delay was necessary for effective police investigations. Technically speaking, a "reasonable

101 Ibid. para 21.
102 Ibid. para 26.
103 Ibid. paras 28–29.
105 Ibid. p 32F–G.
106 (Cap 68, 1985 Rev Ed Sing).
107 Jasbir Singh (n 104 above), p 32H.
108 Ibid. p 32F.
period of time” could simply be how ever long it took the police to extract a damning statement or even a plea of guilt out of an accused.

The constitutional right to counsel was subordinated to the need to facilitate police investigations, without any balancing of the individual’s interests against the state’s interests. This achieves crime control at the expense of due process. The presumptive bias adopted by the court favours the state rather than the individual, contrary to the role of the judiciary as a check on the misuse of state power. Together, the holdings in Rajeevan and Jasbir severely dilute the constitutional right to counsel.

Subjecting Exercise of Freedom of Religion to Communitarian Ideology

In Colin Chan v Public Prosecutor,109 a case that involved the ambit of the freedom of religion, two distinct trends can be detected which show excessive deference to the executive: firstly, the “four walls” doctrine which rejects the use of foreign authorities in constitutional adjudication; and secondly, the no-balancing approach which allows public order to trump individual liberty without due consideration and weighing of the various issues involved.110

In Colin Chan, the appellants were convicted of being in possession of prohibited religious materials published by the Watch Tower Bible & Tract Society (WTBTS), which had earlier been prohibited.111 The publications were related to the doctrines of a religious sect known as the Jehovah’s Witnesses. The sect prohibited its members from performing military duty, thus it was deregistered and all publications from its parent body, WTBTS, were banned.112 The appellants did not dispute possession of the prohibited materials, but contended on appeal that the deregistration of the sect and the banning of related materials were unconstitutional in so far as they unlawfully denied Jehovah’s Witnesses

111 Chan Hiang Leng Colin (n 109 above), p 662E.
112 Ibid. p 662F–662H.
their constitutional right of religious liberty pursuant to Article 15\textsuperscript{113} of the Constitution.\textsuperscript{114}

"Four Walls" Doctrine
Yong CJ instead approved of the observations in Government of Kelantan v Government of Malaysia\textsuperscript{115} where Thompson J said:

"the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia".\textsuperscript{116}

Yong CJ then dismissed the American authorities brought up by the appellants by: (i) focusing on an insignificant difference which he declared as fundamental; and (ii) the unsubstantiated assertion that social conditions are markedly different. There was no proper reasoning offered as to why reliance on foreign law was unjustified. The American authorities were dismissed in a rapid fire fashion, with little consideration of their value as a guide towards interpreting Article 15 of the Constitution.

The "four walls" doctrine seems to have been given too literal a meaning: \textit{prima facie}, any foreign authorities can be simply dismissed, without any proper analysis as seen in Colin Chan.\textsuperscript{117}

\textsuperscript{113} Art 15 reads:
\begin{quote}
"15. — (1) Every person has the right to profess and practise his religion and to propagate it.
(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
(3) Every religious group has the right —
(a) to manage its own religious affairs;
(b) to establish and maintain institutions for religious or charitable purposes; and
(c) to acquire and own property and hold and administer it in accordance with law.
(4) This Art does not authorise any act contrary to any general law relating to public order, public health or morality".
\end{quote}


\textsuperscript{115} Government of Kelantan v Government of Malaysia [1963] MLJ 355. This was, however, not a case on the constitutional right to freedom of religion; it was an action brought by the Government of the state of Kelantan which sought to oppose and nullify the 1963 Malaysia Agreement between the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore whereby Singapore, Sarawak and North Borneo would federate with the existing states of the Federation of Malaya (including Kelantan), thereby forming Malaysia. The impact of the Malaysia Agreement was to amend certain provisions in the Constitution in order to reflect the changes brought about by the Agreement. The plaintiff argued that the 1963 Malaysia Agreement and the amendments were void or alternatively not binding on itself because its ruler was not consulted in accordance with the Constitution as regards the constitutional amendments made. The court held that the defendant had in fact acted constitutionally and dismissed the plaintiff's action.

\textsuperscript{116} Chan Hsia Leng Colin (n 109 above), p 681D.

\textsuperscript{117} Ibid. p 681E-G.
"The social conditions in Singapore are, of course, markedly different from those in the United States. On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context."\(^{118}\)

It was a convenient dismissal technique – with no attempt at elaborating what the different social conditions were that made the analogies inappropriate.

Yong CJ also rejected the American authorities based on an insignificant difference:

"The American provision consists of an 'establishment clause' which proscribes any preference for a particular religion (Congress shall make no law respecting an establishment of religion) and a 'free exercise clause' which is based on the principle of governmental non-interference with religion (Congress shall make no law prohibiting the free exercise thereof). Significantly, the Singapore Constitution does not prohibit the 'establishment' of any religion."\(^{119}\)

The focus on the absence of the "establishment" clause to support the distinguishing of the American authorities was inappropriate because the issue was not one of establishment or state endorsement.\(^{120}\) Rather, the issue was the extent to which the state could regulate the religious liberty of individuals.\(^{121}\) The judicial reasoning in the American authorities put forth could have been used as a guide to arrive at a correct balance between freedom and regulation of religion.\(^{122}\)

It is submitted that the reasons for rejecting the foreign authorities should be clearly enunciated. If there are no cogent reasons for rejecting them, they should be accepted as guides for constitutional adjudication. This does not run contrary to the "four walls" doctrine; the doctrine, on a broader view, simply serves as a reminder that the local context in which the constitutional adjudication is being conducted should be taken into consideration, and the courts should not blindly adopt the reasoning and interpretation of a foreign authority. The doctrine should not serve as a convenient façade behind which the courts can hide when it wishes to side-step foreign authorities that are contrary to the favoured judicial conclusion in constitutional adjudication.

\(^{118}\) Ibid. p 681G.
\(^{119}\) Ibid. p 681F–G.
\(^{120}\) Thio (n 10 above), p 175.
\(^{121}\) Ibid.
\(^{122}\) Ibid. pp 175–176.
On the flip side, when the foreign authorities favour the preferred judicial conclusion, the Singapore court seems to cite such authority with approval despite significant distinguishing factors. In Colin Chan, the court cited, with approval, the case of Adelaide Company of Jehovah's Witnesses v Commonwealth of Australia. This was despite the fact that the Australian case was decided under the extraordinary circumstances of World War II. This necessitated and justified the curtailment of the religious liberty of the Jehovah Witnesses. In contrast, Singapore was in no armed conflict at the material time; the Australian decision was clearly distinguishable.

Any valid legal authority, foreign or local, should be accepted or rejected based on sound legal reasoning, and not unsubstantiated assertions. Although it is-conceded that more caution must be used in accepting foreign authorities in constitutional matters, this does not mean that such authorities can be rejected without proper reasoning.

No Balancing of Interests
When dealing with the substance of the freedom of religion, Yong CJ stated:

"I am of the view that religious beliefs ought to have proper protection, but actions undertaken or flowing from such beliefs must conform with the general law relating to public order and social protection. The right of freedom of religion must be reconciled with 'the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery. 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".

This passage is self-contradictory. The use of the word "reconcile" entails a compromise between two opposing objects through a holistic balancing process. However, in the same passage, Yong CJ stated that the actions flowing from religious beliefs must "conform" to general law, meaning that there is essentially no balancing process, and that the former must always bow to the latter.

123 Chan Hiang Leng Colin (n 109 above), pp 683–684.
125 Chan Hiang Leng Colin (n 109 above), p 684F.
126 Thio (n 10 above), p 162.
127 Ibid.
Further, a strong tendency of deference to the executive can be detected. Yong CJ stated:

“The basic proposition in judicial review is that the court will not question the merits of the exercise of the ministerial discretion. There can be no enquiry as to whether it was a correct or proper exercise or whether it should or ought to have been taken. The court cannot substitute its own view as to how the discretion should be exercised with that actually taken”.$^{128}$

Effectively, this means that Article 15(4) of the Constitution is able to trump the declaration of religious liberty in Article 15(1) so long as the relevant governmental authorities make a determination that the relevant action in question is against public order, public health or morality. This treats the ministerial discretion as subjective, and not open to judicial review.$^{129}$ By acquiescing to ministerial discretion, the court abdicates its powers of judicial review in favour of deference to the executive. This contradicts Yong CJ’s earlier assertion in the same case that:

“the court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides”.$^{130}$

A court cannot properly exercise its duty as the protector of the constitution if it adopts an overly deferential attitude towards the executive. Such an attitude negates, and undermines, the role of the judiciary as a check on the executive’s powers, and its role as the protector of individual rights against any oppression by the executive. This should not be the case, especially when the issue involves a serious curtailment of a constitutional liberty like that of religious liberty as guaranteed by Article 15(1) of the Constitution.

There is a fine line between judicial legislation and judicial review. It is arguable that judicial review of ministerial discretion constitutes an unacceptable overstepping of boundaries, and should be disallowed. However, even if ministerial discretion was not open for review, the fact of whether the exercise of that discretion was warranted is certainly open for judicial review. It is well within the judiciary's legitimate scope to objectively

$^{128}$ Chan Hiang Leng Colin (n 109 above), p 682B.
$^{129}$ Thio (n 10 above), p 162.
$^{130}$ Chan Hiang Leng Colin (n 109 above), p 641C.
review whether the issue was one concerning public order, and hence whether ministerial discretion was warranted in the first place. In conducting such a review, the judiciary is not carrying out judicial legislation by questioning the exercise of ministerial discretion. Rather, it is reviewing whether the issue itself warrants the exercise of ministerial discretion. This can be answered by an objective balancing approach as to whether the action in question is against public order, public health or morality as set out in Article 15(4). It cannot be answered by the courts acquiescing to the executive opinion of the relevant minister that the action in question is against public order, and hence the exercise of the discretion was valid. Such acquiescence is tantamount to the abdication of judicial review, and the role of the judiciary as a protector of individual rights.

In dismissing the appellants’ argument that the Jehovah’s Witnesses were neither a threat to public order nor a threat to society, Yong CJ in Colin Chan simply relied upon the fact that the relevant minister had determined that by refusing to perform national service, the Jehovah’s Witnesses posed a threat to national security, before concluding, “[s]uch considerations are clearly related to public interest” and the minister’s determination was valid. The argument of public order being threatened by a refusal to perform national service for pacifistic reasons was accepted to trump issues of the freedom of religion, without carrying out any balancing exercise. This amounts to an adoption of the communitarian ideology, without properly reviewing the appropriate weight to be attached to the espoused communitarian interest that is sought to be protected.

A better approach would have been to weigh the various factors, such as the number of Jehovah’s Witnesses in Singapore, and the nature of their doctrine, before coming to the conclusion that their actions were against public order, and that the threat to public order was so grave as to warrant the use of Article 15(4) to negate the constitutional right of religious liberty under Article 15(1).

A point to note is that in the process of carrying out this balancing process, the judicial attitude that should be taken is “an especial concern for the individual who is in an unequal position against the full force of state machinery”. A weighted approach in favour of the individual rather than a neutral stance should be taken. Such an attitude and approach clearly has not been taken in Singapore; there is no balancing

131 Chan Hiang Leng Colin (n 109 above), p 686G–H.
132 Thio (n 10 above), pp 83–84.
133 Ibid. p 65.
134 Ibid.
process in the first place. Even if there was some semblance of a balancing process, the deferential attitude of the Singapore judiciary towards the executive undermines the protection of the individual in any balancing process that is carried out.

**Arbitrary Deprivation of Property**

The right of a person to own property and to exclude anyone from arbitrarily depriving him of his property is not enshrined within the Constitution of Singapore. This was despite the fact that it was recommended in the Report of the Constitutional Commission Singapore 1966, *Protection of Fundamental Rights and Freedoms of the Individual*.\(^\text{135}\)

The absence of such a provision is in stark contrast with Article 17 of the *Universal Declaration of Human Rights* (UDHR),\(^\text{136}\) and the fact that most constitutions in the world specifically provide for a right to property.\(^\text{137}\) It appears that the like of Article 17 of the UDHR (originally found in Article 13(1) of the Federal Constitution when Singapore was still part of Malaysia) is absent in the Constitution of Singapore today due to policy reasons: that land is scarce in Singapore, and that individual right to ownership of land ought to give way to the wider public interest of land planning and urban (re)development.\(^\text{138}\) Nonetheless, it should be noted that the word “property” does not solely refer to real property, for it includes personal property as well, to which the policy reason does not apply.

It would seem that policy considerations were so pertinent in 1966 as to totally obliterate the constitutional guarantee of a right to property. This clearly shows a communitarian approach being taken right from the outset of Singapore’s formation.

And this was to set the tone for the judicial and political landscape in Singapore for years to come. Initially, such policies were considered essential given the troubles that an infant Singapore would have faced. However, in modern Singapore, there should be a shift in focus towards protection of individual liberty and rights. This is even more pertinent,

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135 Report of the Constitutional Commission Singapore 1966, *Protection of Fundamental Rights and Freedoms of the Individual*, p 41. The commission recommended that (1) No person shall be deprived of property save in accordance with the law; and (2) No law shall provide for the compulsory acquisition or use of property except for a public purpose of a purpose useful or beneficial to the public and except upon just terms.

136 Art 17 of the UDHR provides that “[e]veryone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property”.

137 See n 135 above.

given that Singapore is a member of the United Nations, and Singapore has, on occasion, declared that it adheres to the UDHR which specifically provides for a right to property.\textsuperscript{139} Even though the right to property is not a constitutional right, it would seem prudent to not arbitrarily deprive a person of his or her property without due process.

It would seem that the law adopts a communitarian approach, with emphasis being placed on crime control rather than due process, neglecting the protection of individual rights. The Singapore courts have adopted a literalist approach towards interpreting statutes that allow the deprivation of one's property. This can be seen in the context of the \textit{Immigration Act}.\textsuperscript{140}

An outline of the law on immigration-related offences is in order to highlight the fragility of this seemingly unrecognised right to property in Singapore today. The ease with which a person may be deprived of his property due to immigration offences is disturbing, especially when the person is not guilty \textit{per se}, but was an unwitting participant.

The Legislature has always shown great concern for immigration-related offences such as harbouring and employment of illegal immigrants in Singapore.\textsuperscript{141} Hence, it comes as no surprise that Parliament is constantly seeking to tighten the \textit{Immigration Act}, in order to deter the public from committing or abetting the commission of the offences stipulated in the \textit{Immigration Act}. The lingering problem with the \textit{Immigration Act} lies with the power vested in the courts to order detention and seizure of property (in particular, vessels or vehicles) under s 49 of the \textit{Immigration Act}:

"Any vessel below 76 tons or any vehicle that is used, or in respect of which there is reasonable cause to suspect that it has been or that it is about to be used,

\textsuperscript{139} See, eg, Philia, "A Universal Declaration of Human Responsibilities", available at http://www.philia.ca/cms_en/page1287.cfm (visited 15 May 2010) where it was said: "In 1997 a group of 24 former head of state [Mr Lee Kuan Yew being one of them], following the leadership of the German philosopher Hans Küng, formulated "A Universal Declaration of Human Responsibilities". The group, which calls itself the InterAction Council, aims to have this declaration endorsed by the United Nations, so that the current one-sided declaration of rights will be completed by this new document". See also http://www.interactioncouncil.org/udhr/udhr.html (visited 15 May 2010). It is noteworthy that Art 8 of the Universal Declaration of Human Responsibilities provides that "No persons or group should rob or arbitrarily deprive any other person or group of their property"; this is substantially similar to Art 17 of the UDHR: see n 136 above.

\textsuperscript{140} \textit{Immigration Act} (Cap 133, 1997 Rev Ed Sing).

\textsuperscript{141} "Sir, Singapore is a small country with limited resources. The presence of immigration offenders, such as illegal immigrants and overstayers, poses a serious social problem, and compromises our safety and security. MHA has taken, and will continue to take, a tough stance against all immigration offenders as well as anyone who harbours, employs or assists them to enter or remain unlawfully in Singapore": Sing., \textit{Parliamentary Debates}, vol 78, col 995 at 1071 (16 November 2004) (Assoc Prof Ho Peng Kee).
in the commission of any offence under this Act or the regulations may be seized and detained at any place either on land or in the territorial waters of Singapore”. (emphasis mine).^{142}

The corresponding provision providing for the drastic consequence of forfeiture is:

“Where, upon an application by the Public Prosecutor, it is proved to the satisfaction of a court that an offence under this Act or the regulations has been committed and that the vehicle or vessel was used in the commission of the offence, the court shall make an order for the forfeiture of the vehicle or vessel, notwithstanding that no person may have been charged with or convicted of the offence”. (emphasis mine).^{143}

While it is fair to deploy seizure and detention of property as an interlocutory measure, forfeiture under s 49(6), however, seems to diminish the individual right to property which has already been deprived of formal recognition in the Constitution.

Firstly, with regard to abetment of immigration offences, *Daw Aye Aye Mu v PP*^{144} cited with approval the case of *PP v Datuk Tan Cheng Swee*^{145} that the mens rea required for the offence of abetment is (i) an intention to aid, conspire or instigate the principal offender, although the principal offender need not be convicted or charged; and (ii) knowledge of the essential facts that make the acts an offence.

Interestingly, just within one year of the judgment by Yong CJ in *Daw Aye Aye Mu*, his judicial pronouncement on the mens rea for abetment took a marked shift in *Awutar Singh s/o Margar Singh v PP*^{146} and *Loh Kim Lan v PP*,^{147} departing from *Daw Aye Aye Mu* by effectively situating negligence in the requisite mens rea for abetment. In *Mohd Aslam s/o Jahandad v PP*,^{148} Yong CJ further reiterated that “while mere neglecting to make

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^{142} *Immigration Act* (Cap 133, 1997 Rev Ed Sing), s 49(1). See also s 48(1) which provides that “[t]he Controller may by writing under his hand authorise the Director of Marine to detain any vessel in connection with which an offence under this Act is reasonably believed to have been or to be about to be committed, and the vessel may then be detained either at the place where it is found or at any place to which the Controller may order it to be brought”.

^{143} *Immigration Act* (Cap 133, 1997 Rev Ed Sing), s 49(6). See also s 48(4) which provides that “[i]f default is made in the payment of any such fine, costs, expenses or charges, the Director of Marine may seize the vessel and the vessel shall be declared forfeited to the Government by order of a court of competent jurisdiction upon the application of the Attorney-General”.


^{145} *PP v Datuk Tan Cheng Swee and Others* [1979] 1 MLJ 166, 173.

^{146} 3 SLR 439, para 49.

^{147} [2001] 1 SLR 552, para 37.

^{148} [2006] 2 SLR 511, para 15.
inquiries which a reasonable and prudent man would make” did not constitute guilty knowledge, actual knowledge could be inferred from the evidence that “the defendant had deliberately or wilfully shut his eyes to the obvious or that he had refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed”. It seems that the requisite mens rea is somewhat hovering between wilful blindness and negligence on top of actual knowledge. These pronouncements seem to weaken the requirement of knowledge of the essential facts that make the act criminal.

The imprecision of the mens rea required for abetment of immigration offences results in great judicial leeway in determining whether the requisite mens rea is met. Given the trend of excessive deference to the executive and legislature, coupled with the communitarian emphasis in Singapore, the lower mens rea of negligence will likely be applied in most cases, allowing the deprivation of property for the sake of crime control.

Even though the right to property is not a constitutional right, the deprivation of another's property based on criminal grounds should only be justified by his or her culpability in connection with the crime charged. There must be some firm pronouncement on the mens rea of abetment of immigration offences. It is submitted that minimally, a subjective mens rea of knowledge should be adopted. This, coupled with the requirement of intention to abet, would ensure that the accused is sufficiently culpable before he is charged with abetment, an inchoate crime, and have his property forfeited. The position on mens rea in Daw Aye Aye Mu should be adhered to for abetment of immigration-related offences, because it provides a balance between crime control and due process.

Secondly, the forfeiture provision provides for forfeiture notwithstanding that no person may have been charged with or convicted of the offence as long as the vessel or vehicle has been used in the commission of an offence under the Immigration Act. This is disturbing. Taken to its logical end, the effect of this forfeiture provision is that an owner of a vehicle could suffer forfeiture of his property even where he is not complicit with the offence committed. Thus in Credit Corporation (M)

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149 See further Lin Bin v PP [2005] SGHC 213, paras 41–42 (a charge under s 57(1)(e) – employment of illegal immigrant). However, it may be argued that today it is beyond doubt that wilful blindness and negligence, at least, are categorically included as the requisite mens rea for harbouring offences under s 57(1)(d) of the Immigration Act: see, eg, Loo See Mei v PP [2004] 2 SLR 27, para 55; on employment of illegal immigrants, see, eg, Yeo Chiang Chew v PP [2003] 1 SLR 46, para 13 and Tan Choon Kin v PP [2002] 4 SLR 169, paras 24–26.
Bhd v PP\(^{150}\) Yong CJ, in dismissing a petition to reverse a forfeiture order made, held:

"The petition resembled closely the case of Public Finance Bhd v PP [1997] 3 SLR 354. In Public Finance Bhd, in interpreting s 49(6) Immigration Act, I pointed out that once the two conditions under s 49(6) are met, forfeiture of the vehicle is mandatory. The two conditions are:

(a) commission of the offence; and
(b) use of the vehicle in the commission of the offence.

This stipulation is clear, unmistakable and exhaustive. There are no other factors to be considered. It precludes reliance by the court on any other factors that might be raised by the offender or, indeed by any other party such as the owner of the vehicle". (emphasis mine).\(^{151}\)

The court adopted an overly literalist approach towards the interpretation of s 49(6) by stating that as long as the two conditions as laid out in Credit Corporation are met, forfeiture of the vehicle was mandatory.\(^{152}\) The policy reasons cited by Yong CJ in support of his judgment mainly hinged on the need to uphold the strong deterrent effect against human smuggling syndicates through reducing the pool of easy resources available, and at the same time urging innocent vehicle owners to exercise greater care in preventing their vehicles from becoming easy theft targets.\(^{153}\)

With respect, imposing such an onerous and strict form of liability on innocent vehicle owners departs from the general principles of criminal sanctions – that is to punish and deter the unscrupulous, not the innocent.\(^ {154}\) It is not the aim of the criminal law to punish an innocent accused. This much has been stated in the case of Tan Kiam Peng v PP\(^{155}\):

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\(^{150}\) [2000] 3 SLR 762.

\(^{151}\) Ibid. para 8. Yong CJ added at para 11 that "even though the court sympathised with the owners, forfeiture must be ordered once it has been used in the commission of the offence, regardless of whether the petitioner had participated in the criminal offence. The provision is clear and mandatory. The owners would have to be left to their remedies against the offenders". See also Public Finance Bhd v PP [1997] 3 SLR 354, para 6. Such an approach is not unique to immigration-related offences. In fact, a similar stance was adopted in the context of the Customs Act (Cap 70, 1995 Rev Ed Sing) as well: see, eg, PP v Mhs Serve You Motor Services [1996] 1 SLR 669 (forfeiture of vehicle used to transport contraband cigarettes).

\(^{152}\) See n 150 above.

\(^{153}\) Ibid. paras 15–18.

\(^{154}\) See also Michael Hor, "Illegal Immigration: Principle and Pragmatism in the Criminal Law" (2002) 14 SaCL 18. 23 (in the context of employment and harbouring offences): "the real concern of the government is not really the negligent or careless, but those who employ or harbour with full knowledge (the "unscrupulous"), yet who pretend to be ignorant"

\(^{155}\) Public Prosecutor v Tan Kiam Peng v PP [2007] 1 SLR 522 (case was in the context of drug trafficking and possession).
"If the facts of the case merely show that he was uncommonly stupid, unconventionally ignorant, extremely naïve or plainly reckless ..., the accused is entitled to an acquittal".\textsuperscript{156}

The aim of criminal law is to punish and deter the unscrupulous who can be proven to have some sort of culpability. Therefore, even where crime control ought to prevail over due process of criminal law for policy reasons, the Singapore court must first satisfy itself as to a finding of some genuine culpability on the part of a sufferer of forfeiture, before such a balancing exercise can be rightfully conducted. Policy reasons cited in favour of the Crime Control Model should never have a life of its own, at the expense of due process.

Section 49(6) of the \textit{Immigration Act} seems to be a hybrid between the inchoate offence of abetment and the offence of strict liability. It is similar to abetment, in that it does not require any principal offender to be convicted or charged. It is similar to strict liability, in that all that is required for the section to apply is the proving of certain circumstances, with no fault being required on the part of the person being punished.

Akin to strict liability, a presumption of \textit{mens rea}, which has been accepted in Singapore,\textsuperscript{157} should be imposed on the accused. This means that the court should presume that there is a \textit{mens rea} requirement to be proven before the property can be forfeited. The level of \textit{mens rea} required,akin to abetment, would be that of an intention to aid the commission of the act in question, and knowledge that the act was an offence. Importing the presumption of \textit{mens rea} from strict liability offences into s 49(6) of the \textit{Immigration Act} strikes a balance between crime control and due process, in so far as the harshness of s 49(6) is mitigated by requiring proof of culpability unless the four conditions laid out in \textit{Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong}\textsuperscript{158} are met. Firstly, the presumption is particularly strong where the offence is "truly criminal" in character. Secondly, the presumption applies to statutory offences and can be displaced, only if this is clearly or by necessary implication the effect of the statute. Thirdly, the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue. Fourthly, even where a statute is concerned with such an issue, the presumption of \textit{mens rea} stands, unless it can also be shown that the creation of strict

\textsuperscript{156} Ibid. para 28.
\textsuperscript{158} \textit{Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong} [1985] AC 1. The four conditions to rebut the presumption of \textit{mens rea} were approved in the case of \textit{Teo Kwang Kiang (ibid)}. 
liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. In 2004, the attempt by Parliament to mitigate the harshness of the law, albeit on principle laudable, was skimpily implemented. The *Immigration (Amendment) Act 2004* merely amended s 49(6) to, *inter alia*, include a new subs 6A:

“No vehicle or vessel shall be forfeited under this section if it is established by the owner thereof that the vehicle or vessel was unlawfully in the possession of another person without the consent of the owner”.

Apparently, the drafter of the amendment had overlooked the express intention of Parliament in drafting the new subs 6A. While Parliament has expressly voiced its sympathy towards owners of vehicles “who might have given their consent to drivers who might commit offences without the owner's knowledge”, the wording of subs 6A only exonerates innocent owners who had *not* given consent to *unlawful* possession to the primary offender in possession. The protection under subs 6A offers no accommodation to situations where the owner had *given* consent to a *lawful* possession. This silence on the specific scenario contemplated by Parliament in the *Immigration Act* could potentially be misinterpreted by judges inclined to retreat to legalistic and formalistic black-letter

159 Presumably in mitigating the harshness of the ruling in *Credit Corporation (M) Bhd v PP* (n 150 above), para 8 as well.
160 Sing., *Parliamentary Debates*, vol 78, col 995 at 1093 (16 November 2004) (Mr Chandra Mohan K. Nair): “There may be innocent owners who might have given their consent to drivers who might commit offences without the owner's knowledge. It is hoped that in such cases the innocent owners' vehicles would not be forfeited. The power to order a forfeiture by the court should be exercised very cautiously and sparingly, lest it offends against the right of ownership of an innocent vehicle owner”. (emphasis mine). On this account, it thus seems that the legalistic approach adopted in *Credit Corporation (M) Bhd v PP* (n 150 above) must be wrong.
162 (No 53 of 2004).
163 For a driver in lawful possession could still commit an offence of engaging in a business or trade of conveying illegal immigrants to and out of Singapore under the *Immigration Act* (Cap 133, 1997 Rev Ed Sing), s 57(1)(c) without the vehicle owner’s knowledge.
readings in statutory interpretation – something that is inimical to the due process of criminal adjudication.\textsuperscript{164}

It should perhaps be pointed out that following the Immigration (Amendment) Act 2004, the words “upon an application by the Public Prosecutor” were added to s 49(6). An argument may thus be made that due process would be upheld since the application for forfeiture is now at the discretion of the prosecutor and, unlike the previous s 49(6), does not require automatic judicial attention.\textsuperscript{165}

However, this apparently new prosecutorial discretion is of limited assistance in addressing the concern showed by Parliament – the prosecution, if it were so minded, could still press for forfeiture with almost little impediment in light of the court’s reluctance to review the matter on anything more than the “two conditions” provided in s 49(6).\textsuperscript{166} The court, generally perceived to have an inclination towards a formalistic approach towards constitutional interpretation of individual rights, may alternatively regard\textsuperscript{167} the poorly drafted defence clause under s 49(6A) as “clear, unmistakable and exhaustive”\textsuperscript{168} so as to exclude other plausible defences that would otherwise be tenable.

Moreover, pre-2004 case authorities have displayed a trend whereby the prosecution had proceeded to apply for forfeiture notwithstanding

\textsuperscript{164} For an owner who has given consent but without the mens rea of the offence could still have his vehicle forfeited since the Immigration Act (Cap 133, 1997 Rev Ed Sing), s 49(6) operates notwithstanding that no person may have been charged with or convicted of the offence: see n 150 above, para 8. It would be meaningless to contemplate a situation where the owner had not given consent to a lawful possession since an absence of consent by the owner to permit the taking possession would in any event be unlawful. While the situation where the owner had given consent to unlawful possession may too seem like a paradox, it is not an impossibility albeit a rarity in reality: A, the owner of vehicle, tells B to steal a vehicle which, unknown to A, belongs to A. B retains possession of the vehicle. B then proceeds on a frolic of his own in conveying illegal immigrants with the vehicle without A’s knowledge. Although A is morally culpable for instigating a vehicle theft of his own vehicle, on principle this should not be critical against the forfeiture of A’s vehicle on account of B’s independent wrongdoing without A’s knowledge. However, sub s 6A does not provide any protection for such a scenario.

\textsuperscript{165} However, it has been observed that in practice forfeiture has always been initiated by prosecutorial application even before the Immigration (Amendment) Act 2004: see, eg, Credit Corporation (M) Bhd v PP (n 150 above); PP v Mayban Finance (Singapore) Ltd [1998] 1 SLR 462; Public Finance Bhd v PP [1997] 3 SLR 354. See also Credit Corporation (M) Bhd v PP (n 150 above), para 10: “Indeed, it is within the relevant authorities’ discretion to make a forfeiture application to the [court] … However, once the authorities make a forfeiture application, the court will only be concerned whether the two conditions have been met. And if they have been, a forfeiture order must be made”. (emphasis mine). The only meaningful conclusion that could be drawn from this is that the 2004 addition of the words “upon an application by the Public Prosecutor” should not be taken to mean that the pre-2004 position supposes that the prosecution has no discretion in application.

\textsuperscript{166} See n 150 above, para 8.

\textsuperscript{167} For example, based on a canon of textual interpretation expressio unius est exclusio alterius.

\textsuperscript{168} See, eg, n 150 above, para 8.
that the vehicle owner was *prima facie* innocent, the reasons for such unknown.

The combined effect is that there is little judicial review as to whether forfeiture is warranted and the outcome is overly dependent on prosecutorial discretion which is not open to scrutiny. This dilutes due process in favour of crime control, obscuring any semblance of a right to property which should implicitly be accorded to the accused, or at the very least, not be taken away with such ease. As such, it is suggested that the attempted reform in 2004 has effectively done little – if any – in addressing the harshness of *Credit Corporation (M) Bhd v PP*.

Civil-political Rights

The Singapore political leadership's ideology of pragmatism and communitarianism has taken its toll on the substance of civil-political rights in Singapore. The narrowing of civil-political rights into virtual non-existence is justified as the price to pay for economic progress and social and political stability. In particular, freedom of speech is limited by various legislative and administrative measures which give the executive vast, extensive, and, in a number of statutes, untrammelled discretion in regulating and restricting speech on racial, religious and political issues. There are statutes that (i) allow detention without trial; (ii) impose penal sanctions on political speech; (iii) enable the dissolution of societies or rejection of their registration; (iv) impose permit requirements for public assemblies, and licensing requirements for broadcasting services

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169 See, eg, *ibid*, para 7; *PP v Maylan Finance (Singapore) Ltd* [1998] 1 SLR 462, para 14; *Public Finance Bhd v PP* [1997] 3 SLR 354, 354D.


174 *Public Entertainments and Meetings Act* (Cap 257, 2001 Rev Ed Sing), s 3.

and the publication, sale and distribution of newspapers;²⁷⁶ and (v) implement a sophisticated censorship system that covers foreign newspapers,²⁷⁷ foreign broadcasting services,²⁷⁸ publication,²⁷⁹ film,²⁸⁰ and public entertainment.²⁸¹ Many of these statutes had frequently been refined throughout Singapore’s post-independence existence to ensure their effectiveness. Against criticisms of the excessive restrictions imposed on free speech,²⁸² the leadership defends itself with the cultural relativist argument that “there is no universal agreement” beyond the core of basic human rights, and that “human rights are interpreted and implemented according to the specific histories, cultures and circumstances of particular countries”.²⁸³ Non-consequentialist²⁸⁴ justifications for free speech are virtually non-existent²⁸⁵ in the political leadership’s²⁸⁶ construction of the freedom of speech in Singapore.²⁸⁷


²⁸⁴ The current Minister for Law, Mr K. Shanmugam, once commented much earlier as a lawyer that, “freedom of speech is advocated both as an end in itself ... and also as an essential means of an enlightened government”; “Democratic development, freedom of speech and S'pore” The Straits Times, 8 December 1990 (Factiva).


Although the right of freedom of speech is accorded constitutional status, it is subject to eight “necessary or expedient” restrictions, including defamation and contempt of court. Use of defamation actions by the Singapore political leadership can be traced back to the 1970s, with an overwhelming success rate: no governing political leader has ever lost a defamation suit against an opposition leader or a foreign publisher in the Singapore courts. Such frequent use of defamation actions against the opposition and newspapers has been criticised for silencing political dissent from within and without. As in other common law jurisdictions, Singapore courts have the power to punish for contempt of court, to protect the administration of justice as well as the public confidence in it – not the dignity of the courts or judges per se. The law continues to be regularly enforced against contemplators today. The precise scope of these restrictions on free speech calls for judicial determination.

This section focuses on how the Singapore judiciary has invariably demonstrated its allegiance to the prevailing supreme political ideology of pragmatism and communitarianism, by allowing the right of free speech to be incrementally swallowed up by its exceptions.

190 Tey Tsun Hang, “Singapore’s jurisprudence of political defamation and its triple-whammy impact on political speech” [2008] Public Law 452, 452–453. The latest case decision on defamation is Review Publishing Co Ltd v Lee Hsien Loong [2010] 1 SLR 52 where the Court of Appeal upheld the High Court’s decision (see Lee Hsien Loong v Review Publishing Co Ltd [2009] 1 SLR (R) 177) that the defendant, a publisher of the Far Eastern Economic Review, was liable for defamation of the plaintiffs who were primarily the Prime Minister and the Minister Mentor of Singapore.
192 Subordinate Courts Act (Cap 321, 2007 Rev Ed Sing), s 8; Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed Sing), s 7(1).
195 See, latest, “WSJ senior editor fined $10,000 for contempt of court” The Straits Times, 20 March 2009 (Factiva); “Insult to judges: Gopalan Nair’s trial next month” The Straits Times, 5 August 2008 (Factiva) (contemnor was subsequently given a warning after he made an unreserved apology to the court).
Defamation

No Balancing of Interests
The judiciary's disposal of the right of free speech in defamation cases mirrors their approach to criminal rights: in both cases, the courts omit to weigh the competing interests at stake. Just as the declaration of religious liberty in Article 15(1) of the Constitution is easily trumped by its exception in Article 15(4), Article 14(2)(a) listing the "necessary or expedient" restrictions on free speech seems to be a complete answer to the argument that the allegedly offending words were made in exercise of the right of free speech protected by Article 14(1)(a).

For instance, the Court of Appeal held that "it is manifestly beyond argument that Article 14(1)(a) is subject to the common law of defamation as modified by the [Defamation] Act and, accordingly, does not, in itself, afford a defence". Accordingly, the defendant's application to amend his defence to include an Article 14 argument was roundly rejected "as disclosing no reasonable defence to the claim". No attempt was made to examine the constitutionality of the provisions of the Defamation Act, or to otherwise balance the freedom of speech against private reputational interests. Notwithstanding its duty in safeguarding the right of free speech, the judiciary has opted for minimalist review where defamation law is concerned, without considering the adverse consequences for political discourse or the significance of free speech in a democratic society.

Inconsistent Judicial Formalism
In Jeyaretnam Joshua Benjamin v Lee Kuan Yew, two foreign decisions from America and the European Court of Human Rights, cited as support for recognising the defence of qualified privilege, were rejected on the basis of textual differences between the Singapore Constitution, on the one hand, and the Constitution of the United States and the European Convention on Human Rights respectively, on the other hand.

However, the Court of Appeal was quick to apply two Canadian authorities to support its conclusion that the defence of qualified privilege

196 See accompanying text to n 129 above.
197 Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1990] SLR 38, 39E-H.
199 Defamation Act (Cap 75, 1985 Rev Ed Sing).
200 See Tey (n 190 above), pp 454-455.
202 Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, 330F.
failed,203 despite the fact that the cases had been decided in the absence of a constitutional right of free speech, prior to the enactment of the Canadian Charter of Rights and Freedoms.204

This brings forth two observations. Firstly, minor textual differences appear to hold decisive weight when the Singapore judiciary found it necessary to reject a liberal construction of fundamental liberties found in foreign case-law. Conversely, seemingly glaring differences lose their significance when foreign cases are cited to justify a pro-reputational protection outcome. This double-standard in the adoption of a literalist approach favours the public’s interest in retaining confidence in their leaders, at the expense of the individual’s interest in having freedom of speech.

Turning the Public Figure Doctrine on its Head205

Along with the defence of qualified privilege, the Singapore judiciary summarily dismissed the public figure doctrine,206 resulting in equal reputational protection for politicians and private citizens alike.207 An artificial distinction was drawn between political figures suing in their official capacities, and in their personal private capacities as citizens.208 But whereas the official capacities of public figures were conveniently overlooked in the assessment of liability, the very same factor operated as an aggravating factor in the assessment of damages,209 by way of vindicatory measurement.210

The Singapore public figure is thus “twice blest” in defamation suits, being entitled to the same protection as private citizens, but also to much higher damages.211 The award of crippling damages212 creates a chilling effect on free speech, especially since bankruptcy of political opponents

203 Ibid. pp 3341–336B. The two Canadian cases referred to approvingly were Tucker v Douglas (1950) 2 DLR 827 and Campbell v Spoutiswoode (1863) 32 L.J QB 185. The court also rejected the defence based on a textualist reading of the Defamation Act (Cap 75, 1985 Rev Ed Sing), s 14.

204 Thio (n 10 above), p 183.

205 See Tey (n 190 above), p 461.


210 See Tey (n 190 above), p 460.

211 Ibid. p 461.

212 See ibid. pp 459–460 for a description of the disproportionate damages awarded to governing political leaders relative to the damages awarded to others.
has often resulted, thereby disqualifying them from contesting in parliamentary elections.\textsuperscript{213}

\textit{Judicial Readiness in Finding Defamatory Meaning}\textsuperscript{214}

Political defamation cases heard in Singapore thus far often involved situations where the offensive and defamatory nature of the disputed words only became apparent after clinical analysis of the offending words. It is insinuations, innuendo and implications of the content – rather than the express words of the content – that were taken to give rise to the actual sting claimed and pleaded by the plaintiffs.

In \textit{Jeyaretnam v Lee Kuan Yew},\textsuperscript{215} the defendant (an opposition politician) had questioned the plaintiff’s (who was then the Prime Minister) honesty at an election rally. The plaintiff claimed that allegations of questionable honesty made against him in the context of the controversy surrounding a ruling party member’s recent unnatural death implied the plaintiff’s involvement in the cover-up of that party member’s suicide, and that the ordinary listener would also understand it to be so. At trial, the judge merely summarised the respective submissions of counsel for the plaintiff and the defendant, before abruptly accepting the submissions of the former.\textsuperscript{216} This was accepted by the Court of Appeal.\textsuperscript{217}

Neither the trial judge nor the Court of Appeal made any apparent attempt at considering whether the defendant’s words were capable of any alternative meaning that was non-defamatory. Similarly, in \textit{Goh Chok Tong v Chee Soon Juan}\textsuperscript{218} and \textit{Lee Kuan Yew v Chee Soon Juan},\textsuperscript{219} the High Court accepted the senior assistant registrar’s finding of imputation of dishonesty without considering whether the defendant’s words were capable of any non-defamatory meaning. Meanwhile, in \textit{Goh Chok Tong v Tang Liang Hong}, the trial judge simply ruled that, “[i]n my judgment what I have set out is the single and right meaning of the utterances and the article”.\textsuperscript{220}

\textit{Judicial Communitarianism}

Together, the trends in judicial reasoning – the refusal to engage in any balancing exercise, inconsistent judicial formalism, inversion of the

\begin{footnotesize}

\textsuperscript{214} See also Tey (n 190 above), pp 456–458.

\textsuperscript{215} [1992] 2 SLR 310.

\textsuperscript{216} [1990] 3 MLJ 322.

\textsuperscript{217} [1992] 2 SLR 310.

\textsuperscript{218} [2003] 3 SLR 32, para 56.

\textsuperscript{219} [2003] SLR 8, para 55.

\textsuperscript{220} [1997] 2 SLR 641, para 63.2.
\end{footnotesize}
public figure doctrine and readiness to find defamatory meaning—reflect a presumptive bias against the defendant, and free speech interests, in defamation actions involving governing political leaders. The "normative force" of the constitutional right of free speech is deemed to be secondary to the "common good" of protecting the public reputation of politicians and public institutions—thus the aggravated damages to vindicate the plaintiff's reputation, lest his ability to discharge his public duties be affected.

A communitarian approach mirroring the supreme political leadership's ideology is adopted, whereby maintaining public confidence in the political leaders' integrity is of paramount importance for promoting effective governance. Regrettably, this is achieved at the expense of freedom of speech, and open political debate—essential elements of a democratic society. If the public has an interest in the maintenance of public character, surely it also has an interest in the free discussion of public matters.

Contempt of Court

Poor Balancing Exercise

The critique on defamation cases highlighted above applies mutatis mutandis in relation to the balancing exercise between free speech protection and offence of scandalising the judiciary. A formalistic approach is used to reject arguments grounded on Article 14(1)(a) of the Constitution, and

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222 See also Goh Chok Tong v Chee Soon Juan (No 2) [2005] 1 SLR 573, para 69: "The statements in both cases attacked the integrity of Mr Goh, a person of unblemished integrity whose ability to discharge the burdens of his high office would be affected if his reputation was tarnished by false accusations".

223 See Tey (n 190 above), p 460. See also Review Publishing Co Ltd v Lee Hsien Loong [2010] 1 SLR 52, para 285 where the Court of Appeal observed in obiter that:

“Our political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of the country. This can be seen from the reply by the then Minister for Law and Minister for Foreign Affairs, Prof S Jayakumar ("Prof Jayakumar"), to a query in Parliament on whether the Government had responded to the allegations made in the US State Department Singapore Country Report on Human Rights Practices 1997. Prof Jayakumar said, "Singapore's political culture ... seeks to maintain a high standard of truth and honesty in politics" (see Singapore Parliamentary Debates, Official Report (20 April 1998) vol 68 at cols 1973–1974), and, therefore (ibid).

If the integrity of [Singapore's] political leaders or key institutions is questioned, Singapore leaders will not hesitate to clear their names and protect these institutions through due process of law”.

224 Thio (n 10 above), p 183.
there seems to be no balancing exercise conducted at all. As the court in Attorney-General v Wain (No 1) simply asserted:

“the short answer to the [argument that the offence of scandalising the court is inconsistent with article 14(1)(a)] is to be found in art 14(2) of the Constitution”.225

This was despite the same court acknowledging earlier that:

“this court has [a] duty to uphold the right to freedom of speech and expression, and I accept that this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts”.226

The court eventually found that there was no need to rebalance the competing interests to take into account the fact that there was a constitutional right of free speech.227 The balance struck by the common law of contempt, which considered free speech as a residual liberty, was deemed appropriate even though this had developed in a context without a written constitution embodying the right of free speech.228 The underlying reason for this conclusion would seem to be an overriding need to protect the judiciary in the public’s interests, thus exhibiting an internalisation of the supreme political ideology of communitarian values and sacrificing individual liberty of free speech.

An Illiberal Test
The Singapore judiciary adopts an illiberal inherent tendency test for determining contempt of court.229 The present test for liability is thus whether a statement has an inherent tendency to interfere with the administration of justice.230 This merely requires a link, even a tenuous one, between the offending words and the interference, rather than a real risk of interference resulting from the words231 – the test presently preferred by many common law countries.232

226 Attorney-General v Wain (No 1) [1991] SLR 383, 387H.
227 Thio (n 10 above), p 178.
228 Ibid.
229 Attorney-General v Wain (No 1) [1991] SLR 383, 397F. This test was most recently affirmed by the High Court in AG v Hertzberg Daniel [2009] 1 SLR 1103, paras 27, 31 and AG v Tan Liang Joo John [2009] 2 SLR 1132, para 12.
231 Thio (n 10 above), p 179.
The rationale for such a low standard seems to be a perceived need to impose prior restraint on potentially deleterious contemptuous conduct, as well as to avoid the perceived impossible task of calling for detailed proof of impairment of the administration of justice.

The rejection of the "real risk" test resulted from applying the likes of the notorious "four walls" doctrine from Chan Hiang Leng Colin v Public Prosecutor. In Attorney-General v Wain, the court in deciding on the permissible boundaries of contempt refused to be influenced by foreign cases and emphasised the need to consider unique local conditions.235 The court's reasoning seems to be that since Singapore judges shoulder greater responsibility as triers of fact and law, they need heightened protection from criticisms because such criticisms have greater adverse repercussions on the reputation of the judiciary.236

However, the court failed to cogently explain why these conditions, in themselves, should be sufficient to warrant exceptionalising the local law on contempt of court. The lack of explanation is even more troubling given the fact that protection of speech critical of the judiciary is arguably more vital in jurisdictions without jury trials. The more responsibility the judiciary assumes, the more important it is to enable free discussion of the performance of its duties in order to ensure accountability.237 Further, an exclusionary "guillotine" approach was taken to reject English cases decided post-1981 due simply to certain English legislative changes.238 But how these factors actually had a strong bearing on the judges' decisions remains largely unexplained and speculative.

*Judicial Communitarianism*

In short, the law of contempt as a permissible derogation from Article 14(1)(a) is essentially grounded on public interest concerns. Underlying the judicial over-sensitivity towards critique, and hence the harsh use of contempt of court proceedings to silence critics, seems to be the thinking that suppression of critique is necessary for the maintenance of confidence in the administration of justice.

Such an attitude fails to take account of the fact that critique of the judiciary is not always inimical to the public's interest in maintaining

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233 The Constitution should primarily be interpreted free from the influence of, and not be interpreted with analogies from, foreign jurisprudence. See n 110 above.
234 Chan Hiang Leng Colin (n 109 above).
235 Attorney-General v Wain (No 1) [1991] SLR 383, 394A.
236 Ibid, p 394B-E.
237 See n 187 above, p 307.
public confidence in the authorities. In *R v Kapynko,*\(^{239}\) the court did not regard the Canadian courts as being “fragile flowers” that would “wilt in the heat of controversy”. Neither should the Singapore courts be so regarded without any good justifications. Houlden JA had this to say: “The Canadian judiciary are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous the criticism may be.”\(^{240}\)

The Singapore judiciary’s approach seems to be undergirded by the assumption that Singaporeans are gullible, and lack the capacity to discern the ludicrous, from the reasonable. The Canadian courts obviously have greater faith in their people.\(^{241}\) The Singapore judiciary appears to take a myopic and literal interpretation in adjudicating contempt of court cases. The focus on insignificant differences in rejecting English authorities, coupled with unargued assertions of different socio-cultural conditions, shows that the Singapore court has abdicated its role as the guardian of individual rights.

The judicial approach taken undermines the right of free speech for the purpose of maintaining the judiciary’s integrity and the administration of justice. This further lends force to the argument that the judiciary has, in fact, internalised the communitarian ideology, thereby undermining its function as an independent check against the excesses of the executive.

**Conclusion**

The supreme political ideology governing Singapore, with its strong emphasis on communitarian values, was borne out of its turbulent formative years. Despite the evolution of Singapore into a modern, first-world country, no progress has been made in incorporating recent human rights developments into this ideology.

Instead, the communitarian approach to governance continues to be hailed as an alternative to western liberal rights ideology, and has been refined to such an extent as to ensure continued hegemonic dominance by the governing political leadership. This political ideology has spilled over, via judicial ties to the executive, into the legal sphere, where the

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\(^{239}\) See n 232 above.

\(^{240}\) Ibid.

\(^{241}\) Ibid: “the Canadian citizenry are not so gullible that they will lose faith and confidence in the Canadian judicial system because of such criticism”.
Singapore judiciary favours government-defined collective interests at the expense of individual rights.

In cases involving criminal rights, the Singapore judiciary has consistently adopted a narrow and formalistic approach to adjudication. Instead of scrutinising legislation for substantive fairness, the Singapore judiciary restricted its role to screening for procedural propriety. On various occasions when it could have interpreted constitutional provisions expansively to include implicit rights, the Singapore judiciary adhered rigidly to the text of the law.

Due process was subordinated to crime control without weighing the competing interests at stake. In dealing with foreign jurisprudence, the Singapore judiciary has exhibited an inconsistent stance. When foreign authorities were adverse to the favoured judicial outcome, the Singapore judiciary disposed of them by relying on superficial differences and unargued assertions. On the other hand, when foreign authorities were favourable, the Singapore judiciary conveniently ignored the differences, and accepted them without proper analysis.

Meanwhile, in cases involving the civil-political right of free speech, the Singapore judiciary has restricted the right into virtual non-existence, by expanding the exceptions of defamation and contempt of court. In doing so, the Singapore judiciary relied on the same techniques as those employed in criminal rights cases. These include taking an inconsistent stance towards foreign jurisprudence, interpreting statutes and constitutional documents in a formalistic manner, and allowing public interests to trump the right of free speech without balancing the various interests at stake. The Singapore court’s refusal to properly analyse the merits of liberal defamation and contempt of court laws is a clear sign of political and judicial hypersensitivity to criticisms, which creates a chilling effect on open political debate, and the airing of public concerns regarding the carrying out of public functions. The Singapore political leadership and the Singapore judiciary seem to rely on the façade of public interests in order to justify the suppression of criticisms.

In sum, post-1980s jurisprudence shows that the Singapore judiciary has in fact internalised the supreme political ideology, resulting in excessive deference to the executive determinations of public interests, and the watering down of both criminal and civil-political rights.