BEYOND THE "FOUR WALLS" IN AN AGE OF TRANSNATIONAL JUDICIAL CONVERSATIONS

CIVIL LIBERTIES, RIGHTS THEORIES, AND CONSTITUTIONAL ADJUDICATION IN MALAYSIA AND SINGAPORE

LI-ANN THIO*

---

* Ph.D. (Cambridge); LL.M. (Harvard); B.A. (Oxford) (Hons.); Barrister (Gray's Inn, U.K.); Associate Professor, Faculty of Law, National University of Singapore. This Article is based on a paper presented at the inaugural conference of the Asian Forum on Constitutional Law, *Constitutionalism and Constitutional Adjudication in Asia*, Seoul National University College of Law, Korea (Sept. 2005).

I. INTRODUCTION

The judicial articulation of a "four walls" doctrine as a governing principle of constitutional interpretation, extant in both Malaysia and Singapore, is indicative of a particularized theory of constitutional interpretation that limits the legitimate sources of law which may inform constitutional construction. The "four walls" doctrine suggests an insularity discordant with the vigorous interest in "transnational judicial conversations,"[1] within a growing "world community of courts."[2] This trend is indicative of the openness of certain national courts towards citing, evaluating, and applying foreign decisions and international human rights law ("transnational law") in adjudicating civil liberties. Indeed, comparative constitutional law has become something of a "cottage

---

[1] Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 499-532 (2000). For further discussions on the use of comparative jurisprudence, see Anne-Marie Slaughter, *Judicial Globalisation*, 40 VA. J. INT'L L. 1103 (2000); Sujit Choudhry, *Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301 (2004); Philip Alston, PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (2000).

[2] *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (observing that Constitutional courts from Canada, South Africa, and India are among the most active participants in this dialogue of [usually western liberal] values and that this dialogue is not monolithic, as even European Court of Human Rights jurisprudence allows for regional particularities through the "margin of appreciation" doctrine).

industry" in certain jurisdictions.[3] While liberal democracies have engaged in cross-fertilization in the development of rights, it is clear that the participants in this conversation are limited. Indeed, one might discern that in contrast to liberal democracies, courts in non-liberal jurisdictions utilize transnational sources to buttress public order concerns rather than expand rights.

When the four walls doctrine was invoked by Malaysian courts and adopted in 1994 by the Singaporean Chief Justice in *Colin Chan v. Public Prosecutor*,[4] these decisions were each strategic moves to orientate future public law developments along an "autochthonous," localized, or indigenous track, particularly in relation to civil liberties jurisprudence. At the very least, the doctrine was invoked to insulate domestic cases from external influences especially when they were rights-expanding. In 1963, Chief Justice Thomson stated in *Government of State of Kelantan v. Government of Federation of Malaya*[5] that 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." Ironically, Chief Justice Thomson borrowed from a Nigerian case to reach this determination.[6] He recalled Lord Radcliffe's statement in *Adegbenro v. Akintola* that unlike the unwritten British Constitution, the Western Nigerian Constitution was now written and had "sought to formulate with precision" the powers of governmental bodies.[7] The document stood "in its own right."[8] While admitting the utility of drawing on British practice "in interpreting a doubtful phrase whose origin can be traced" or in studying how U.S. and Australian Constitutions deal with federalism problems, "it is in the end the wording of the Constitution itself that is to be interpreted and applied," which cannot be "overridden by the extraneous principles of other Constitutions."[9]

However, the four walls doctrine does not require an exclusive reliance on domestic legal sources. Rather, it is permissible to "look at other constitutions to learn from their experiences, and from a desire to

---

[3] *See* Ruti Teitel, *Book Review: Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004) (explaining terms of textbook production, university courses, and seminars).

[4] Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662, 681 (High Ct. 1994).

[5] Gov't of State of Kelantan v. Gov't of Fed'n of Malaya & Tunku Abdul Rahman, 1 MALAY. L.J. 355, 359 (1963), *cited with approval in* Pub. Prosecutor v. Pung Chen Choon, 1 MALAY. L.J. 566 (Sup. Ct. 1994).

[6] *See* V.V. Ramraj, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT'L COMP. L. 302, 309-10 (2002).

[7] Adegbenro v. Akintola, (1963) 3 All E.R. 544, 551 (Eng.), *quoted in* Loh Kooi Choon v. Gov't of Malay., 2 MALAY. L.J. 187, 188-89 (1977).

[8] *Id.*

[9] *Id.*

see how their progress and well-being is ensured by their fundamental law," while bearing in mind that "each country frames its constitution according to its genius and for the good of its own society."[10] While comparative constitutional law is useful in providing models for constitution-making, their utility as interpretive aids, perceived as the importing of "foreign values" into a particular domestic context as opposed to "universalist values," has been questioned.[11]

Historically, it is evident that Commonwealth constitutions based on the Westminster model of government, adopting the English common law and its system of precedents, shared some commonality of values and similarities in judicial rights interpretation. When the Privy Council was the final appellate court in Malaysia and Singapore, it was open to comparative law since it dealt with appeals from jurisdictions throughout the Commonwealth; its decisions had precedential weight in this context.[12] However, the Privy Council no longer is at the apex of the judicial hierarchy in either country.[13] Empirically, it is clear there has been a steady traffic of foreign cases in both Malaysian and Singaporean courts, and the courts have some ambivalence towards transnational sources as a basis for constitutional constructions. In vacillating between judicial provincialism and engagement with universal values, a tension

---

[10] *Id.*

[11] *See* Printz v. U.S., 521 U.S. 898, 921 (1997) (stating that "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it [is] quite relevant to the task of writing one"). *See also* Justices Antonin Scalia & Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, Debate at U.S. Association of Constitutional Law Discussion (Jan. 13, 2005) (showing an illuminating discussion on the constitutional relevance of foreign court decisions, the problems of systematic usage, legitimacy and practical comparative difficulties), *available at* http://www.freerepublic.com/focus/f-news/1352357/posts; Al-Kateb v. Godwin (2004) 78 A.L.R. 1988 (Austl.) (providing an Australian parallel); ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003).

[12] *See* Justice Michael Kirby, Companion of the Order of Australia, International Law—The Impact on National Constitutions, Address at the 7th Annual Grotius Lecture, Annual Meeting, American Society of International Law (Mar. 29, 2005) (observing that the Judicial Committee of the Privy Council "helped to infuse in judges of Commonwealth countries a global outlook about the basic principles of the law, an interest in comparative law and a conviction that all wisdom was not necessarily local"), *available at*
http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar05.html#btm.

[13] Up until August 8, 1994, the Privy Council was the final court of appeal for civil and criminal cases in Singapore. This colonial umbilical cord was severed because after thirty years of independence, the Singaporean legal system had attained a sufficient level of investor confidence such that it did not need to have the Privy Council as a guarantor of impartial justice. Decision makers also felt that Privy Council judges were no longer sufficiently attuned to local conditions, particularly in public law matters. Minister Jayakumar, Judicial Committee (Repeal) Bill, 62 SING. PARL. REP. at cols. 388-89 (Feb. 23, 1994). In Malaysia, appeals to the Privy Council ceased in relation to criminal and constitutional matters beginning January 1, 1978, and in relation to civil matters beginning January 1, 1985. These changes were effected by the Courts of Judicature (Amendment) Act 1976 and Constitution (Amendment) Act 1983. *See* WU MIN AUN, THE MALAYSIAN LEGAL SYSTEM 156-60 (3rd ed. 2005).

between "nationalism" and "cosmopolitan internationalism" is evident in terms of interpretive approaches.

An examination of the judicial approaches of Malaysian and Singaporean courts is particularly apt as their constitutions share the same genealogy, as well as fundamental rights clauses, which were similarly formulated. When Singapore seceded from the Federation of Malaysia on August 9, 1965, its Independence Constitution borrowed heavily from the Malaysian Constitution, though certain modifications were made.[14] Today the courts of both countries continue to make mutual references to each other's decisions in the process of adjudicating rights cases. The Federal Constitution of Malaysia, a product of Anglo-Malayan drafting, "drew substantially from English constitutional traditions and to a lesser extent, from the Indian, Australian and American constitutions...The elaborate section of fundamental rights [(Part I, Articles 3-4, and Part II)] was based on similar provisions in the Indian Constitution which in itself was influenced by the Bill of Rights in the American Constitution."[15] The ideas of Westminster and the experience of India have mingled with those of Malaysia to produce a distinct form of government.[16]

This genealogy has found its way into the Singaporean Constitution as well. Part IV (Fundamental Liberties Chapter) of the Constitution of the Republic of Singapore is derived, with modifications, from Part II of the Malaysian Constitution.[17] The Privy Council noted in *Ong Ah Chuan v. Public Prosecutor* that the eight Articles in Part IV of the Singaporean Constitution were "identical with similar provisions in the Constitution of Malaysia."[18] Part IV rights relate to the protection of life and liberty, due process rights, prohibition against retrospective legislation, equality, freedom of movement and prohibition against forced labour, freedom of speech, religious freedom and limited rights to education. It omitted certain rights present in the Malaysian bill of rights, such as the property rights clause, which would inhibit the operation of compulsory land acquisition laws which the Singaporean government considered crucial to development planning.[19]

---

[14] Independence Act, 1965, ACT NO. 9 (Sing.).

[15] *See* JOSEPH M. FERNANDO, THE MAKING OF THE MALAYAN CONSTITUTION 212 (2001).

[16] R.H. HICKLING, ESSAYS IN MALAYSIAN LAW 17 (1991).

[17] After Singapore seceded from the Federation of Malaysia in 1965, it selectively retained and adopted parts of the Malaysian Constitution through the Republic of Singapore Independence Act. Independence Act, 1965, ACT NO. 9 (Sing.). Notable exclusions are the property rights clause, Article 13 of the Malaysian Constitution, and the restrictive clause permitting the enactment of anti-propagation laws, Article 11 of the Malaysian Constitution.

[18] Ong Ah Chuan v. Pub. Prosecutor, 1 MALAY. L.J. 64, 70 (1981).

[19] *See* Li-ann Thio, *Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law*, 8 Sing. Y.B. Int'l L. 41, 44 (2004).

The formulation of liberties in Singaporean and Malaysian jurisprudence departed from the Anglo-American style of phrasing freedoms in absolute terms. Rather, rights are expressly qualified by references to community goods like public order and morality. This is more reflective of "dignitarian" rights drafted after the Continental European and Latin American models, where the individual is not autonomous but situated, with responsibilities, within communities.[20] Indeed, Judge Lai Kew Chai in *Lee Kuan Yew v. Jeyaretnam JB (No. 1)* observed of Singapore's free speech clause (derived from Article 10 of the Malaysian Constitution) that "[f]reedom of speech is in terms of Article 14 subject to or restricted by the law of defamation, much like the underlying concepts and constitutional bargain which are expressed by Article 10 of the European Convention on Human Rights."[21] While Article 10(1) declares the right to free speech, Clause 2 qualifies this in terms of underscoring that freedom "carries with it dues and responsibilities" such that it may be limited to serve public goods like public order, national security and the protection of health and morals.[22]

However, a crucial difference between the European Convention model and that of Singapore and Malaysia is the willingness to engage in comparative assessments of when free speech rights are outweighed by other concerns. In the Convention, limits on free speech are tied to normative concepts that are subject to external evaluation, like "necessary in a democratic society."[23] In contrast, in both Singapore and Malaysia, the parliament may restrict free speech wherever the government determines itself that such limitation is "necessary or expedient." This statist, utilitarian formulation, which presumptively disposes one to a nationalist approach towards constitutional interpretation, was deliberate. Proposals were rejected during the drafting of the Malaysian Constitution to include the word "reasonable" before the word "restrictions" in Article 10 of the Malaysian Constitution.[24] This move, which made the Legislature the sole judge of the "reasonability" of a restriction, was designed to avoid a lack of certainty in legislation that would be present if these terms were susceptible to challenge on the ground of

---

[20] *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 227 (2002).

[21] Lee Kuan Yew v. Jeyaretnam JB (No. 1), 1 SING. L. REP. 688, 706 (1990).

[22] FED. CONST. MALAY. art. 10(1), cl. 2.

[23] Eur. Conv. on H.R. art. 10(2), 213 U.N.T.S. 222.

[24] JUSTICE ABDUL HAMID, NOTE OF DISSENT, FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION para. 13(II) (1956-57) [hereinafter NOTE OF DISSENT], *reprinted in* KEVIN Y.L. TAN & LI-ANN THIO, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 983 (2d ed. Butterworths 1997) (1991).

unreasonableness.[25] The preference for political checks rather than the legal check of judicial review is evident in this rationale.[26] This is typical of the constitutional logic of "parliamentary supremacy."[27]

Singaporean and Malaysian courts clearly are engaging with transnational sources in the constitutional adjudication of rights, although such sources only have persuasive weight, not precedential value. The more illuminating question, which this Article addresses, is how transnational materials have been used, accepted, or rejected in judicial decisions to either confirm judicial reasoning and buttress the status quo and four walls or instead to service progressive developments in a rights-expanding manner. Have such sources been used selectively, even inaccurately, to serve instrumental purposes or buttress pre-determined statist conclusions, or have they been a positive aid in developing normative reasoning, as a source of creative insight to enhance judicial reasoning by exposure to a broader range of ideas and experience? Do these courts engage in the "transnational judicial conversations" of the "world community of courts," or have they started their own distinct thread, informed by the particularity of values and state priorities? What implications does this have for rights theory and the role of constitutional review?

Part II of this Article deals with courts' approach towards interpreting the bill of rights in Commonwealth constitutions, the scope of

---

[25] The Malaysian Supreme Court noted in *Public Prosecutor v. Pung Chen Choon*, 1 MALAY. L.J. 566 (1994), that the Malaysian and Indian Constitutions lacked an express reference to freedom of the press, in contrast with the U.S. First Amendment. However, a "consistent current of judicial opinion in India has established the proposition that [Article] 19(1)(A) [of the Indian Constitution] includes within its ambit the freedom of the press." *Pung Chen Choon*, 1 MALAY. L.J. at 576. *See, e.g.*, Bennett Coleman v. Union of India, A.I.R. 1973 S.C. 107 (India). Article 19(1)(A) states, "All citizens shall have the right to freedom of speech and expression." INDIA CONST. art. 19(1)(A). Nevertheless, Lord President Omar found that the Malaysian courts, in considering infringement of Article 10 free speech rights, were in a different position from Indian judges, as the Indian Constitution requires that restrictions to this liberty be "reasonable," which placed upon the Indian courts the duty to decide its reasonableness. *Pung Chen Choon*, 1 MALAY. L.J. at 576. A Malaysian judge could only decide the narrower question of whether the impugned law falls within the ambit of permitted restrictions in pith and substance. Thus, press freedom in Malaysia was "not as free" as in India, England, or the U.S., which meant that "the Indian cases and the Privy Council case of *Leonard Hector v. Att'y-Gen. of Antigua and Barbuda*" were of "little relevance" and "need not be discussed" due to the four walls theory. *Pung Chen Choon*, 1 MALAY. L.J. at 576.

[26] NOTE OF DISSENT, *supra* note 24.

[27] This logic regards parliamentary supremacy rather than judicial review as the chief guarantor of liberty. It has been argued that the British do not "possess an inherent suspicion of the political authorities" and that Parliament may be expected to exercise restraint and to act reasonably in relation to restrictions on individual rights, pursuant to the "Government-Parliament Oriented Model for Protecting Human Rights." In this context, judges defer to Parliament as a chief human rights protector, trusting in the political sanction of elections to control errant governments. Ariel L Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 686 & 705 (2002).

judicial review in Singapore and Malaysia, and their general attitudes towards foreign decisions and international human rights standards. Part III analyses the constitutional adjudication of cases used to buttress the four walls, while Part IV examines cases that seek to push constitutional rights discourse beyond the four walls. Part V offers concluding observations.

II. COMMONWEALTH CONSTITUTIONS AND RIGHTS INTERPRETATION

A. Constitutional Liberties and the Scope of Judicial Review in Malaysia and Singapore

English Law Lord Diplock, in a 1979 address, noted that the Malaysian judiciary (therefore, also the Singaporean judiciary) enjoyed a "new dimension" in terms of judicial power as it extended to judicial control of the legislative branch, and that in declaring and interpreting law, the judiciary had "an even greater responsibility" in developing public law.[28] This power stems from the constitutional supremacy clause,[29] pursuant to which courts may strike down unconstitutional legislation, not merely invalidate illegal administrative action, as is the case for the English judiciary where Parliament is supreme.[30] This aspect of judicial power was expressly affirmed by the Singaporean High Court in *Taw Cheng Kong v. Public Prosecutor*.[31]

However, it must be noted that judicial review is restricted by constitutional notwithstanding clauses that immunize the breaching of certain fundamental liberties in the enactment and application of special laws against subversion.[32] Ouster clauses have a tendency to be

---

[28] *See* Lord Diplock, *Judicial Control of Government*, 2 MALAY. L.J. cxl (1979).

[29] SING. CONST. pt. II, art. 9.

[30] The English judicial watchdog role was enhanced when it enacted the Human Rights Act of 2000, incorporating the European Convention on Human Rights. Where Parliament is supreme, the chief constraint operating upon it is political rather than legal, thus while Parliament can legislate contrary to fundamental human rights principles, this incurs a political cost. *See* R. v. Sec'y of State for Home Dep't, *ex parte* Simms, (1999) 3 All E.R. 400 (Eng.) (Hoffman, L.) (noting that U.K. courts "apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document"). *See also* Bendor & Segal, *supra* note 27.

[31] *See* Taw Cheng Kong v. Pub. Prosecutor, 1 SING. L. REP. 943 (High Ct. 1998) (deciding to void a legislative provision of the Prevention of Corruption Act for being unconstitutional), *vacated*, 2 SING. L. REP. 410 (C.A. 1998).

[32] SING. CONST. pt. XII, art. 149. *See* Ah Thian v. Gov't of Malay., 2 MALAY. L.J. 112, 113 (1976) (noting that "the doctrine of the supremacy of Parliament" does not apply in Malaysia, instead there is a written constitution, which limits the power and law-making abilities of Parliament and of state legislatures).

construed broadly and upheld.[33] Furthermore, judicial review does not extend to social and economic rights.[34] In summary, both Singaporean and Malaysian courts possess the constitutional mandate to develop a robust form of review for the adjudication of rights, on both the basis of common law principles and constitutional standards. Whether this potential has been realized is examined below.

B. Principles of Constitutional Interpretation for Commonwealth Constitutions

The idea that Commonwealth constitutions share a common constitutional foundation was underscored by English Chief Justice Lord Woolf in a recent lecture before the Singapore Academy of Law in August 2005. He noted that the Magna Carta contains "many of the core features of a legal system of a society that today adheres to the rule of law. They became part of the common law and as such part of the law of many countries and I would suggest part of the law of Singapore."[35] Woolf endorsed the view that this marked the path to individual freedoms, parliamentary democracy, and the supremacy of the law, noting that the European Convention on Human Rights was "based on Magna Carta principles."[36] He stated that "both our countries share a most important ancient heritage in the rule of law," which the judiciaries were responsible to "protect at all costs."[37]

This suggests that there are certain "universalist" principles within Westminster constitutions that would allow for some trade in constitutional ideas, at least within the Commonwealth context. Indeed, in interpreting fundamental rights provisions, the Privy Council articulated a pro-individual approach that has been subsequently affirmed in Malaysian and Singaporean cases at least in formal terms, if not applied in practice. Lord Diplock in *Ong Ah Chuan* stated that Indian

---

[33] *See, e.g.*, Teo Soh Lung v. Minister of Home Aff., 3 MALAY. L.J. 241 (1988) (in relation to the Internal Security Act, 1960, ACT NO. 82 (Malay.)).

[34] The plaintiff in *Merdeka University Berhad v. Government of Malaysia*, 2 MALAY. L.J. 356 (High Ct. 1981), contended that the refusal of his petition to establish a Chinese-language school was contrary to Article 26 of the Universal Declaration on Human Rights (parental right to choose education for children). The court found that the national education policy did consider parental wishes but Justice Abdoolcader explained that the court's powers to make declarations only relates to justiciable matters "and does not extend to moral, social or political matters." *Merdeka Univ. Berhad*, 2 MALAY. L.J. at 366. *See also* Lim Cho Hock v. Gov't of State of Perak, 2 MALAY. L.J. 148, 153 (1980).

[35] English Chief Justice Lord Woolf, Constitutional Protection without a Written Constitution, Lecture at the Singapore Academy of Law (Aug. 2005), *available at* http://www.sal.org.sg/Pdf/SAL%20Annual%20Lecture%202005.pdf.

[36] *Id.*

[37] *Id.*

court decisions on fundamental rights laid out in Part III of the Indian Constitution needed to be approached "with caution" in interpreting Part IV of the Singaporean Constitution, as Indian liberties were "much less compendious and detailed" in formulation.[38] Furthermore, he declared that U.S. Supreme Court decisions based on U.S. Bill of Rights, "whose phraseology is now nearly two hundred years old, are of little help" in construing Commonwealth constitutions broadly following the Westminster model.[39] Principles for constitutional interpretation were *sui generis*, to be suited to the character of the constitution but without discounting the language used.[40] It was recognized that precedents play a "lesser part" in interpreting constitutions as compared to ordinary statutes.[41]

1. Judicial Generosity and Parsimony (or the Pedant and the Prophet)

Despite this caution with respect to foreign sources, national tribunals have said that rights should be construed in a purposive,[42] generous manner to avoid what Lord Wilberforce termed "the austerity of tabulated legalism" and so as to ensure that individuals receive the "full measure" of fundamental liberties.[43] Furthermore, courts were to give derogating clauses a narrow and restricted interpretation.[44] Nevertheless, the courts do not have leave "to stretch or pervert the language of the

---

[38] Ong Ah Chuan v. Pub. Prosecutor, 1 MALAY. L.J. 64, 68 (1981).

[39] *Id.*

[40] *See* Dewan Undangan Negeri Kelantan v. Nordin bin Salleh, 1 MALAY. L.J. 697, 709 (1992) (recalling the words of Australian High Court Chief Justice Barwick, that to produce "stability," the only "true guide" is to "read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning" (quoting McKinley v. Commw. of Austl. (1975) 135 C.L.R. 1, 17 (Austl.)).

[41] *See* Dato Menteri Othman bin Baginda v. Dato Ombid Syed Alwi bin Syed Idrust, 1 MALAY. L.J. 29 (1981). The equation of constitutional interpretation with statutory interpretation was evident in *Government of Malaysia v. Loh Wai Kong*, where Lord President Suffian said that the meaning of words in a statute depends on the context of their location and that "the same principles applies to a constitution." This assertion, however, was not supported by authority. *See* Gov't of Malay. v. Loh Wai Kong, 2 MALAY. L.J. 33, 34 (Kuala Lumpur, C.A. 1979). *But see* Hinds v. Queen, (1976) 1 All E.R. 353, 359 (P.C.) (Eng.) (deeming it "misleading" to apply to constitutions ordinary canons of construction that applies to ordinary laws).

[42] Constitutional Reference No. 1 of 1995, 2 SING. L. REP. 201 (1995) (describing how the Singapore Constitutional Tribunal advocated the adoption of a purposive approach towards interpreting the Constitution so as to give effect to the intent and will of Parliament, and, furthermore, explaining that Section 9A of the Interpretation Act required no ambiguity or inconsistency before resort to contemporaneous speeches and documents was permissible).

[43] *See* Minister of Home Aff. v. Fisher, [1980] A.C. 319, 329 (P.C.) (U.K.) (stating that constitutions should be read "with less rigidity and more generosity than any other Acts").

[44] *See Ong Ah Chuan*, 1 MALAY. L.J. at 64.

Constitution."[45] Further, they should, pursuant to the doctrine of harmonious construction, read the constitution in its entirety to "give effect to all" provisions and "not to distort or enhance the interpretation of a particular right to the perversion of the others."[46]

The Malaysian Supreme Court in *Nordin bin Salleh*[47] accepted the Indian Supreme Court test from *Maneka Gandhi v. Union of India*[48] that in ascertaining whether state action that curtails fundamental rights is valid, the court must consider "whether it directly affects the fundamental rights or [if] its inevitable effect or consequence" is to make their exercise "ineffective or illusory."[49] Supreme Court Judge Edgar Joseph declared that where legally permissible, "the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy."[50] This view rests on a theory of rights that appreciates the fundamental, inalienable status of constitutional rights, as opposed to residual common law liberties, which can be statutorily overridden.[51]

Court of Appeal Judge Gopal Sri Ram, one of the more activist Malaysian judges, recognized that "our public law gains momentum" through "the exercise of the court's interpretive jurisdiction."[52] He rejected a "pedantic" approach towards reading the Constitution, and instead he advocated referring to the Constitution as a "living piece of legislation" and reading Part II of the Malaysian Constitution "prismatically" to discern implied rights from the text in order to ensure citizens "obtain the full benefit and value of those rights."[53] He endorsed

---

[45] *See* Merdeka Univ. v. Gov't of Malay., 2 MALAY. L.J. 356 (1981).

[46] Taw Cheng Kong v. Pub. Prosecutor, 1 SING. L. REP. 943, 956 (High Ct. 1998) (explaining that this point was raised in order to demonstrate that no right is absolute but subject to other constitutional principles).

[47] Dewan Undangan Negeri Kelantan v. Nordin bin Salleh, 1 MALAY. L.J. 697 (1992).

[48] Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597, 712 (India).

[49] *Nordin bin Salleh*, 1 MALAY. L.J. at 712.

[50] *Nordin bin Salleh*, 1 MALAY. L.J. at 726.

[51] *See Taw Cheng Kong*, 1 SING. L. REP. at 965 ("Constitutional rights are enjoyed . . . as fundamental liberties — not stick and carrot privileges. To the extent that the constitution is supreme, those rights are inalienable."). The court also sets out guidelines for construing the Constitution. In construing Part IV, the court should ask two questions: first, to appreciate its importance, what is the underlying rationale of placing a right on a constitutional pedestal; second, to determine the scope of the right and thus how extensive constitutional protection might be. *Id.* at 955.

[52] *See* Palm Oil Research & Dev. Bd. Malay. v. Premium Vegetable Oils, 3 MALAY. L.J. 97, 119 (Putrajaya, Fed. Ct. 2005).

[53] Court of Appeal Judge Gopal Sri Ram, Human Rights: Incorporating International Law into the Present System, Address at Constitutionalism, Human Rights and Good Governance Conference at Kuala Lumpur (Sept. 30 to Oct. 1, 2003) ("The prismatic rule of interpretation enables a court to identify, through the process of derivation, the rights and liberties implied within concepts expressly provided in our Constitution") [hereinafter Gopal Sri Ram's Address], *available at* http://www.mlj.com.my/free/articles/gopalsriram.htm.

Lord Bingham's pro-human rights approach in *Reyes v. Queen* where Bingham stated that the court "does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty."[54] Instead, a "generous and purposive" interpretation was to be given to constitutional provisions protecting human rights.[55] While the court was not at liberty "to read its own predilections and moral values into the Constitution," it was bound to "consider the substance of the fundamental right" and to ensure "contemporary protection" of that right, in accordance with "evolving standards of decency that mark the progress of a maturing society."[56]

However, at the other end of the spectrum, it is evident from certain cases that rights are not "political trumps" whereby "a collective goal is not sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[57] Rather, they are more akin to licenses, subject to the dictates of state-defined communitarian values.[58] Nevertheless, *Ong Ah Chuan's* pro-individual bias towards reading constitutions remains a persistent specter, buffeting against the judicial affirmation of dominant statist values.

2. Literalism versus Liberalism: Law as *Lex* or *Ius*?

Both Malaysia and Singapore share the legal, administrative, and political traditions, adopted from the British as well as English as the working language. Their constitutions were drafted by lawyers steeped in the conventions of Westminster and its comprehension of law not merely as a collection of rules but a system where the word "law," particularly as related to derogation clauses ("in accordance with law"), was associated with substantive principles of fairness. Lord Diplock for the Privy Council rejected literalism in *Ong Ah Chuan v. Public Prosecutor*,[59] declaring that the word "law" in certain contexts ("in accordance with law," "equality before the law," "protection of the law") "refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution." Liberties would be "little better than a mockery" if they

---

[54] *See* Reyes v. Queen, [2002] 2 A.C. 235 (P.C.) (U.K.).
[55] *Id.*
[56] This assumes that decency is evolving upwards; note Justice Scalia's contrary observation that it may be regressing.
[57] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977).
[58] *Id.*
[59] Ong Ah Chuan v. Pub. Prosecutor, 1 MALAY. L.J. 64 (P.C. 1981).

could be curtailed by a legal system which flouted these fundamental rules.[60]

Thus, this "naturalist" approach rejects the positivist obsession of reading rules literally (*lex*), regardless of substantive content, pointing instead towards a need to ascertain the purposes behind the rules (*ius*). In declaring the content of "fundamental rules of natural justice," the Privy Council in *Haw Tua Taw v. Public Prosecutor*[61] seemed to suggest that in construing the Constitution, recourse to a broad range of materials could be appropriate. In seeking to show that the privilege against self-incrimination was not a fundamental rule of natural justice, Lord Diplock cursorily referred to the Universal Declaration of Human Rights and European Convention on Human Rights, as well as inquisitorial systems, but he did not offered any detailed analysis before concluding:

> Such a rule finds no place in the Universal Declaration of Human Rights proclaimed by the United Nations in 1948 nor in the European Convention on Human Rights of 1950. Its nonobservance involves no conflict with the undoubted fundamental rule of natural justice stated in Article 6(2) of the Convention: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'; and in many countries of the non-communist world, whose legal systems are not derived from the common law, the court itself has an investigatory role to play in the judicial process for the trial of criminal offences. In these systems, interrogation of the accused by a judge, though not direct interrogation by the prosecution forms an essential part of the proceedings.[62]

The reference to transnational materials in this instance did not serve to expand rights.

Literalism often translates into deference to legislative intent. An example of the literal approach is the High Court decision in *Mohamad Ezam bin Mohd Nor v. Menteri Dalam Negeri*, which concerned whether Rule 81(5) of the Internal Security (Detained Persons) Rules of 1960 restricted the Article 5(3) constitutional right to counsel by regulating

---

[60] *Id.* at 71.
[61] *See* Haw Tua Taw v. Pub. Prosecutor, 2 MALAY. L.J. 49 (1981).
[62] *Id.* at 81.

visitors to detained persons.[63] The court specifically examined whether this regulation applied to legal counsel.[64] The effect of Rule 81(5) was to curtail the right to counsel in the sense of confidential communication.[65] Judicial Commissioner Balia Yusof stressed that the Article 5(3) right was not absolute because justice was meant to serve not only the accused but also the state. He considered that Rule 81(5) was one means by which the state interest was given "due consideration."[66] The judge thought it was "outside the purview of [his] power to consider the harshness or the unjustness of the provisions of [Rule] 81(5) of the Rules," following the approach of Federal Judge Raja Azlan Shah in *Loh Kooi Choon v. Government of Malaysia*:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter the political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution....[67]

Thus, Judicial Commissioner Balia Yusof considered it beyond his competence to evaluate the fairness of the rule, stating that "it serves no purpose for this court to embark on such an adventure"[68] that involved evaluating the justifications behind executive decision in making different rules for various detention places. This decision manifests the parliamentary supremacy logic of constitutional ordering. This logic is also apparent in the "presumption of constitutionality" that governs judicial review of legislative classifications to ascertain if a distinction contravenes the prohibition against discrimination.[69]

---

[63] *See* Mohamad Ezam bin Mohd Nor v. Menteri Dalam Negeri, 2 MALAY. L.J. 364, 373 (Ipoh, High Ct. 2003), *aff'g* Mohamad Ezam bin Mohd Nor v. Ketua Polis Negara, 4 MALAY. L.J. 449 (Kuala Lumpur, Fed. Ct. 2002).

[64] *Id.*

[65] *Id.* at 375.

[66] *Id.*

[67] *See* Loh Kooi Choon v. Gov't of Malay., 2 MALAY. L.J. 187, 188 (1977).

[68] *See Mohamad Ezam bin Mohd Nor*, 2 MALAY. L.J. at 376.

[69] *See* Danaharta Urus v. Kekatong, 2 MALAY. L.J. 257, 275 (2004) (stating that in the context of jurisprudence on Article 12 of the Singaporean Constitution and Article 8 of the Malaysian Constitution, there is a "presumption that Parliament understands and correctly appreciates the needs of its own people...A court cannot, in the nature of things, be a better judge than Parliament itself in a matter of this kind") (citing Ram Prasad v. State of Bihar, A.I.R. 1953 S.C. 215 (India); Asiatic Engineering Co. v. Achhru Ram, A.I.R. 1951 All 746 (India)).

Literalism also entails deference to parliamentary will in considering as definitive the statutory balance struck between a liberty and permissible restrictions upon it. It manifests a certain ideological commitment to statism or utilitarianism at the expense of rights protection. This is evident in the Singaporean case of *Chee Soon Juan v. Public Prosecutor*.[70] Chee, an opposition politician, held a public meeting, a May Day rally at the Istana, without a license after his license application was declined under the Public Entertainment and Meeting Act ("PEMA").[71] Chee argued that PEMA unconstitutionally infringed on the Article 14 constitutional right to free speech and association.[72] According to Chief Justice Yong, the chief issue was whether Chee's action constituted "public entertainment" under PEMA. Finding it was an "address" under Section 2(m),[73] Chief Justice Yong noted that free speech in any democratic society was not absolute and had to be balanced against "broader societal concerns such as public peace and order."[74] In assessing PEMA's constitutionality, Chief Justice Yong did not consider whether PEMA's terms were necessary in a democratic society generally or in Singapore in particular. Rather, he merely stated that PEMA was enacted pursuant to Article 14(2)(a). Thus, nothing in PEMA was "in any way contrary to our Constitution."[75] This formalistic approach disregards whether these administrative restrictions on constitutional rights are reasonable or fair, considering interests in both personal liberty and public goods, and by such approach, the Singaporean judiciary declines a robust guardianship role over Part IV liberties.

Lastly, judicial deference to parliamentary will is also evident where government policy determines the trajectories along which case law may or may not develop. For example, it is highly unlikely that a deferential court prone to literal interpretation will read a right like that of conscientious objection into Article 15, which guarantees religious freedom, since the government has stated clearly (and practically in conclusive terms) that certain forms of activities like conscientious objection to military service do not fall within the ambit of constitutional rights. It is highly unlikely that a Singaporean court will entertain such claims. Instead, courts are likely to discount foreign jurisprudence arguing for a right of conscientious objection. In *Colin Chan v. Public*

---

[70] *See* Chee Soon Juan v. Pub. Prosecutor, 2 SING. L. REP. 445 (2003).
[71] *Id.* at 447; *see also* Public Entertainment and Meeting Act, 1959, ch. 257, 2001 Rev. Ed. (Sing.).
[72] *Chee Soon Juan*, 2 SING. L. REP. at 448.
[73] *Id.* at 449.
[74] *Id.* at 450.
[75] *Id.*

Prosecutor,[76] for example, the Court recalled a government white paper stating that unlike certain Western Europe countries,

> the idea of conscientious objection does not apply in Singapore. There is no such tradition in Singapore. If we try to introduce the practice here, the whole system of universal National Service will come unstuck...And of course, even in Western Europe, not all countries acknowledge conscientious objectors. In Switzerland, those who do not do National Service also go to jail. Therefore, the Enlistment Act in Singapore does not recognize conscientious objection.[77]

Thus, parliamentary will determines the standards against which the content of a right is identified and restricted.

The court in *Colin Chan* appeared *ad idem* with the executive in prioritizing considerations based on executive-determined order and solemnly affirming the public prosecutor's citing of the Latin maxim *salus populi suprema lex*,[78] buttressing the supreme value of order.[79]

3. Unenumerated Rights, Unenumerated Principles: Textualism or Non-Textualism?

Judges that are deferential to Parliament are less likely to declare unwritten constitutional principles, let alone rights that are not explicit in the constitutional text. In Singapore and Malaysia, judges display conflicting attitudes towards unenumerated rights.

For example, Chief Justice Yong in *Mazlan v. Public Prosecutor*[80] refused to find that the right to silence, a "largely evidential"

---

[76] *See* Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662, 685 (High Ct. 1994).

[77] *Id.* at 678; *Civil and Political Rights, Including the Question of Conscientious Objection to Military Service*, Sec'y Gen. Rep., U.N. COMM'N ON H.R., 56th Sess., at para. 1-3, U.N. Doc. E/CN.4/2000/55. Singapore contested Commission Resolution 1998/77, asserting a right to conscientious objection to military service as an aspect of Article 18 of the Universal Declaration on Human Rights and Article 18 of the International Covenant on Civil and Political Rights, stating these rights were subject to public order and general societal welfare limitations. The Singaporean government noted that national defense was a fundamental sovereign right that trumped individual beliefs, with compulsory military service being the only way small countries like Singapore could establish a credible, deterrent defense force.

[78] *Colin Chan*, 3 SING. L. REP. at 678.

[79] This "blunderbuss" approach to prioritizing order is perhaps a bit overwrought, given that there are currently only about 2,000 Jehovah's Witnesses in Singapore, while countries like Israel, who have even more serious security woes, permit conscientious objector exemptions.

[80] Mazlan v. Pub. Prosecutor, 1 SING. L. REP. 512 (C.A. 1993); *see also* Michael Hor, *The Privilege against Self Incrimination and Fairness to the Accused*, SING. J. LEGAL STUD. 35 (1993).

rule, could be derived from Article 9 as an aspect of fairness or fundamental rules of natural justice. To declare that the presumption against self-incrimination was a constitutional right "would be to elevate an evidential rule to constitutional status" despite the lack of "explicit" constitutional expression.[81] Chief Justice Yong stressed that such an interpretation of Article 9(1) would entail "a degree of adventurous extrapolation which we do not consider justified."[82] The resistance towards finding unenumerated rights demonstrates disinclination towards strengthening individual due process rights through the development of supporting or subsidiary rights associated with a textual right,[83] hence denoting a strict textualism in the courts.

However, this "adventurous extrapolation" seems to have motivated Chief Justice Yong's extra-textual foray, which resulted in the discovery and proclamation of an unwritten constitutional "paramount mandate" in *Colin Chan v. Public Prosecutor*.[84] The issue in *Colin Chan* was whether the religious freedom of Jehovah's Witnesses were being curtailed by administrative orders de-registering the group and banning their literature as the group was considered a threat to public order because of its opposition to the policy of National Service.[85] This case dealt with the supremacy of the "sovereignty, integrity and unity" of Singapore, such that anything running counter to these objectives, including pacifist religious beliefs and practices that opposed compulsory national military service (deemed crucial to public order), must be restrained.[86] Chief Justice Yong held that the legislative policy of National Service was a "fundamental tenet" (political priority) such that "anything which detracts from this should not and cannot be upheld," including constitutional rights.[87] Extra-textual values were judicially invoked as reasons to curtail individual rights in the name of public order, perhaps drawing inspiration from the constitutional declaration of

---

[81] *See Mazlan*, 1 SING. L. REP. at 516.
[82] *Id.*
[83] However, the Attorney General in a statement said there was an implied fundamental right to vote in Singapore, stating, "We have a parliamentary form of government. The Constitution provides for a regular General Election to make up a Parliament, and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right." *Kan Seng Clears the Air on Votes*, THE STRAITS TIMES, May 17, 2001, at H1 (Sing.). Such statements could pave the way for the finding of other unenumerated rights deduced from the Westminster system. *See also* IS VOTING A PRIVILEGE OR A RIGHT, SING. PARL. REP. Vol. 73, col. 1726 (May 16, 2001).
[84] *See* Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662 (High Ct. 1994).
[85] *See* Li-ann Thio, *The Secular Trumps the Sacred: Constitutional Issues Arising out of Colin Chan v. Public Prosecutor*, 16 SING. L. REP. 26 (1994).
[86] *Colin Chan*, 3 SING. L. REP. at 684F.
[87] *Id.* At 678B.

citizens' duties in the Indian Constitution.[88] Chief Justice Yong's approach in this case was instrumental rather than principled, designed to consolidate public order arguments. Effectively, Chief Justice Yong declared a statist "basic feature."[89] Thus, rights are not "trumps" which bear determinative weight against community interests but are instead subordinate to statist imperatives, defined by the executive and supported by the judiciary.

4. Common Law Constitutionalism where the Constitution is Supreme?

In the Malaysian context, certain judges have embraced a "prismatic" approach towards interpreting constitutional rights, which represents a departure from the previous judicial ethos of deference towards parliamentary intent stemming from de facto parliamentary supremacy. Indeed, Chief Justice Ong in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*[90] considered both Indian and English authorities and opined that he preferred the realistic pragmatism of British as compared to Indian decisions: "in my humble opinion, Indian judges, for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive power...."[91] This does not contribute to the judicial importation of transnational values as much as a "living tree" approach towards constitutional interpretation would.[92]

Rights-protective developments in English common law constitutionalism, in declaring rights from common law principles, appear to influence a more robust, creative judicial approach amongst some Malaysian judges. This trend in England is in part owing to the rights-based approach to the Human Rights Act of 2000 demanded of English judges, who now have a larger role in being able to declare legislation incompatible with the European Convention on Human Rights.[93] However, prior to the Act's enactment and subsequent influence, English judges used the common law to create a vehicle for rights protection, in addition to providing a continuing framework for the legitimate exercise

---

[88] Notably, Article 51A of the Indian Constitution provides citizens have the duty "to uphold and protect the sovereignty, unity and integrity of India." INDIA CONST. art. 51A.

[89] K. Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India). *Compare* Teo Soh Lung v. Minister of Home Aff., 2 MALAY L.J. 449 (1989) (apparently rejecting the Indian "basic features" doctrine).

[90] *See* Karam Singh v. Menteri Hal Ehwal Dalam Negeri, 2 MALAY L.J. 129 (1969).

[91] *Id.* at 141.

[92] The living tree doctrine requires "large and liberal" interpretation. It was first articulated in the Canadian case of *Edwards v. Canada (Attorney General)*, [1930] A.C. 124 (P.C.) (appeal taken from Can.) (U.K.).

[93] Human Rights Act, 1998, ch. 42, § 4 (Eng.).

of government power.[94] Certain judges in Malaysia, who oversee a constitutional bill of rights, have nevertheless found it useful to refer to English developments in rights protection mediated through common law principles and values, in order to develop their own brand of constitutional adjudication.

In *Kekatong v. Danaharta Urus*, the court appreciated that the "ultimate constraints upon legislative powers are not political but legal" and that legislation must pass the Article 8(1) fairness test.[95] The court found that the word "law" related to fundamental principles of natural justice in the common law, following *Ong Ah Chuan*. Specifically, the court found that "an integral part of [Article] 8(1)," and thus a constitutional right, was the common law principle that the rule of law "demands minimum standards of substantive and procedural fairness," including access to justice.[96] The reference to Dicey's rule of law[97] as an integral part of the common law that had "influenced many Commonwealth constitutions" and been "expressly incorporated into almost all of them"[98] was used to supplement the deficit in parliamentary intention in *Marathaei D/O Sangullullai v. Syarikat JG Containers*,[99] operating on the presumption that Parliament is presumed to have legislated in accordance with the rule of law.[100] Parliamentary silence thus enabled the court to read the right into the Act; that is, to read both procedural and substantive fairness into a law on the presumption that Parliament legislates in accordance with the rule of law.

Translating Diceyan notions into the Malaysian context, Court of Appeal Judge Ram found that "the rule of law is housed in the equality provision in [A]rticle 8(1) of our Constitution."[101] Because the rule of law (no one is above the law and that access to justice was integral to Article 8(1)) "demands minimum standards of substantive and procedural

---

[94] *See* T.R.S. Allan, *Constitutional Rights and Common Law*, 11 OXFORD J. LEGAL STUD. 453 (1999), *cited in* Kekatong v. Danaharta Urus, 3 MALAY. L.J. 1, 275 (C.A. 2003)).

[95] *Kekatong*, 3 MALAY. L.J. at 3; *see also* Pierson v. Sec'y of State for Home Dep't, (1997) 3 All E.R. 577, 606 (Eng.); R. v. Sec'y of State for Home Dep't, *ex parte* Leech, (1935) All E.R. 539 (Eng.).

[96] *Kekatong*, 3 MALAY. L.J. at 19.

[97] *See generally* A.V. Dicey, *The Rule of Law*, pt. II, *in* INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107 (8th ed. Liberty Fund 1982, 1915).

[98] *See* Marathaei Sangullullai v. Syarikat Containers, 2 MALAY. L.J. 337, 343 (Kuala Lumpur, C.A. 2003).

[99] *See id.* at 341 (finding that the silence of the Industrial Relations Act (1967) on the right to representation in non-compliance proceedings did not remove the litigant's common law right to representation by counsel of his choice).

[100] *Id.*

[101] *Id.* at 344.

fairness,"[102] Parliament could not enact written laws or authorize subsidiary laws contrary to Article 8(1). In Judge Ram's formulation, the "primary approach" of the court in reviewing all written law is to work on "the presumption that Parliament does not intend an unfair or unjust result," to ensure compliance with rule of law in Article 8(1).[103] He stated that this strong but rebuttable presumption of legislative fairness was of "ancient repute" and "general application."[104] Judge Ram buttressed his articulation of a universal common law test of fairness by reference to the term "law" in Article 160(2) of the Malaysian Constitution,[105] which defined "law" as including written law and the common law, "insofar as it is in operation in the Federation."[106] According to Judge Ram, the meaning of "law" was non-exhaustive and "open-ended."[107] He further claimed the definition included unwritten principles, such as "a system of law that is fair and just," citing *Ong Ah Chuan* in support of his analysis.[108]

After finding that the common law test of fairness qualified understandings of "law," Court of Appeal Judge Ram considered that a fundamental principle of the common law was access to justice, citing two English cases to support this point. In these cases, Lord Justice Steyn spoke of a right of "unimpeded access to a court"[109] and Lord Wilberforce described this as a "basic right," ranking as "a constitutional right" even in the context of "our unwritten constitution."[110] Judge Ram referred to Judge Laws' judgment in *Regina v. Lord Chancellor, ex parte Witham*, which noted that "special weight" had been accorded by the common law to citizens' right of access to the courts, described as a "constitutional right."[111] This right could not be abrogated unless Parliament specifically provided so by means of a clear statute. Judge Ram distinguished this statement in the Malaysian context where the written constitution was

---

[102] *See* Kekatong v. Danaharta Urus, 3 MALAY. L.J. 1, 15-16 (C.A. 2003). Court of Appeal Judge Gopal Sri Ram based his view that Article 8(1) codified Dicey's rule of law on reference to English sources, including case law such as *Pierson v. Secretary of State for Home Department*, (1997) 3 All E.R. 577, 606 (Eng.) (recognizing that "the rule of law had procedural and substantive effect and that the rule of law was not the source but consequence of individual rights" and that Parliament was presumed not to legislate contrary to the rule of law).

[103] *Marathaei Sangullullai*, 2 MALAY. L.J. at 344.

[104] *Id.*

[105] FED. CONST. MALAY. art. 160(2) ("Where any State law amends or repeals an existing law made by the Legislature of a State, nothing in Article 75 shall invalidate the amendment or repeal by reason only that the existing law, relating to a matter with regard to which Parliament as well as the Legislature of a State has power to make laws, is federal law as defined by Article 160.").

[106] *Kekatong*, 3 MALAY. L.J. at 15.

[107] *Id.*

[108] *Id.*

[109] *See* R. v. Sec'y of State for Home Dep't, *ex parte* Leech, (1935) All E.R. 539 (Eng.).

[110] *See* Raymond v. Honey, (1982) 1 All E.R. 756, 760 (Eng.).

[111] *See* R. v. L.C., *ex parte* Witham, (1997) 2 All E.R. 779 (Eng.).

supreme, not Parliament. He concluded that since "law" in Article 162 included common law, which imported a test of fairness, any Act of Parliament must satisfy the Article 8(1) fairness test in order to "pass muster."[112]

Court of Appeal Judge Augustine Paul, sitting on the Federal Court, rejected the Court of Appeal's "simplistic"[113] approach to utilizing the common law to declare unenumerated rights as a facet of the rule of law principle. Judge Paul rejected the view that "the common law is always speaking," whether by "process of discovery [or]...evolution."[114] The common law referred to in Article 160(2) was a particular qualified common law determined by reference to the 1956 Civil Law Act, which provided that the common law of England would apply from certain dates,[115] "subject to such qualifications as local circumstances render necessary."[116] The common law existing at the commencement of the Malaysian Constitution, imported through the Act after the stipulated date, would be developed by Malaysian courts after these dates[117] and could be modified by statute. In this sense, any right derived from the common law was incorporated, with any statutory modification, into Article 8(1). By ignoring this reading of Article 160(2) with the Act, the Court of Appeal had deliberately sidelined an important factor, which, if properly considered, "could otherwise have been programmed into a potent and powerful pointer towards the issues involved being properly patterned."[118]

Rejecting the supremacy of common law principles, which dates back to *Dr. Bonham's Case* in 1610,[119] Judge Paul stated that since the continued integration of the common law right of access to justice into Article 8(1) was dependent on any contrary statutory provision, it could not amount to a guaranteed fundamental right.[120] In addition, such right

---

[112] *See Kekatong*, 3 MALAY. L.J. at 17.

[113] *See* Danaharta Urus v. Kekatong, 2 MALAY. L.J. 257, 268 (2004).

[114] *See* Amato v. Queen, [1982] 140 D.L.R. (3d) 405, 433-34 (Can.) (whether in the process of discovery or evolution).

[115] Specific receptive dates are: West Malaysia (Apr. 1956), Sabah (Dec. 1951), Sarawak (Dec. 1949). *See* Civil Law Act, 1956, ACT NO. 67 (revised 1972) (Malay.).

[116] *Id.* at § 3(1).

[117] Sri Inai (Pulau Pinang) v. Yong Yit Swee, 1 MALAY. L.J. 273, 285 (2003).

[118] *Kekatong*, 2 MALAY. L.J. at 268.

[119] Dr. Bonham's Case, (1610) 8 Co. Rep. 107a, 114a (C.P.) (Eng.), *available at* http://press-pubs.uchicago.edu/founders/documents/amendV_due_processs1.html.

[120] *Kekatong*, 2 MALAY. L.J. at 267-70. In this case, Court of Appeal Judge Paul's reasoning takes three steps: (1) § 3(1) of the Civil Law Act allows written federal law to modify the common law right of access to justice; (2) the relevant "common law" in operation is this modified right of access, i.e., federal law modifies or limits common law for the purposes of Article 160(2) of the Constitution; and (3) it is this limited common law which "will now become an integral part of [Article] 8(1)." *Id.* at 267-70. Thus, the effect of Article 160(2) is to render a common law

could not be exercised apart from a court and it was for Parliament to enact federal laws to allocate jurisdiction. Thus Article 8(1) had to be read not in isolation but in conjunction with constitutional provisions like Article 121, which gives Parliament the power to established an "institutionalized mechanism" with power and jurisdiction to determine and facilitate the extent to which the right could be exercised, through parliamentary authority to make laws regulating the jurisdiction and powers of the High Court. Consequently, reading Article 8(1) with Article 121, Judge Paul stated, "Access to justice shall be available only to the extent the courts are empowered to administer justice," which is regulated by federal law.[121] This analysis effectively brings in parliamentary supremacy by the backdoor, since federal law "modifies the common law right of access to justice."[122]

5. A Common Law for the Commonwealth?

National Courts, when faced with international law and foreign constitutional jurisprudence raised by counsel, have increasingly displayed a sensitivity towards transnational influences. Within the Commonwealth, the non-binding Bangalore Principles adopted at a high-level judicial colloquium[123] noted that international human rights law might provide some guidance to domestic judges in human rights cases, particularly where domestic law was uncertain or incomplete. The principles noted a "growing tendency" in common law countries, where treaties were not directly enforceable in national courts, to show regard to these international norms, declaring such an attitude as desirable because it affirms the universality of human rights and the vital judicial role in reconciling the competing claims of individuals and the community.[124] Nevertheless, the principles urged that this enriching process of using

---

"constitutional right," subject to statutory modification, whereupon it is then transmuted into a constitutional right. Common law constitutionalism is not applied directly, but through the Article 160(2) filter. Consequently, "the right of access to justice that was originally integrated into [Article] 8(1) is one which can be modified and is therefore not absolute." *Id.* at 267-70. A common law right, integrated into a constitutional right, informing the content of that constitutional right, may be modified by federal law, not by a constitutional amendment, but by a statute. But the constitutional right is modified not directly by a constitutional amendment but indirectly by statute law, which modifies the common law right which informs the scope of the constitutional right. This is a strange creature indeed.

[121] *Id.* 269.

[122] *Id.*

[123] *See* Chairman P. N. Bhagwati, former Chief Justice of India, Bangalore Principles, Concluding Remarks at the Judicial Colloquium on the Domestic Application of International Human Rights Norms (Feb. 26, 1988), *in* 14 COMMONWEALTH L. BULL. 1196 (1988) [hereinafter Bangalore Principles], *available at* http://www.thecommonwealth.org.

[124] Bangalore Principles pt. I, prin. 7.

comparative and international decisions in domestic courts must fully consider "local laws, traditions, circumstances, and needs."[125]

C. *Fortifying the Defenses? The Turn towards Autochthony and Asian Values*

1. Legislative Overruling of "Activist" Decision

The adoption of a four walls approach towards constitutional interpretation[126] in Singapore, in the sense of erecting barriers to importing foreign case law because of differences in textual rights formulations or substantive cultural particularities, came in the aftermath of a case that some consider the high water mark of judicial review. The Court of Appeal famously quashed a preventive detention order issued under the Internal Security Act[127] ("ISA") against an alleged "Marxist conspirator," through a technicality, in the seminal decision of *Chng Suan Tze v. Minister for Home Affairs*.[128] A clamp down on the use of foreign sources to interpret liberties in a right-expanding manner or in a manner not supportive of government action swiftly ensued through legislative action.

In a well-reasoned and principled judgment that made a careful survey of Commonwealth cases to discern emerging trends, the Court of Appeal overturned the 1971 precedent of *Lee Mau Seng v. Minister of*

---

[125] The 1998 Latimer House Guidelines for the Commonwealth (Parliamentary Supremacy and Judicial Independence) would appear to encourage a similar judicial openness. *See* Joint Colloquium, *Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model* (June 19, 1998), *available at* http://www.cpahq.org/uploadstore/docs/latmrhse.pdf. Two guidelines are noteworthy. First, in countries that are building democratic traditions, judges should "adopt a generous and purposive approach in interpreting a Bill of Rights," as they should appreciate their vital role in "developing and maintaining a vibrant human rights environment throughout the Commonwealth." Bangalore Principles pt. I, prin. 3. Second, international law, especially human rights jurisprudence, "can greatly assist domestic courts in interpreting a Bill of Rights," making it "more meaningful and effective" so at to expand its scope. Bangalore Principles pt. I, prin. 4.

[126] *See* E.K.B. Tan, *Law and Values in Governance: The Singapore Way*, 30 H.K.L.J. 91 (2000) (noting that generally Singapore and Malaysia have sought to harmonize private or commercial law with the best standards from foreign law to ensure investor confidence that their property rights will be safeguarded by the legal system, making foreign cases in the field of commercial field a persuasive authority, in contrast to its weight in the field of public law).

[127] Internal Security Act, 1960, ACT NO. 82 (Malay.).

[128] For ISA powers to be invoked, the President must be satisfied as to the need for detention. In this case, the relevant affidavit was signed by the Permanent Secretary of the Home Affairs Ministry rather than the President, and the court found that presidential satisfaction was to be distinguished from governmental satisfaction; consequently, no admissible evidence of presidential satisfaction was found. *See* Chng Suan Tze v. Minister for Home Aff., 1 SING. L. REP. 132 (1988).

Home Affairs,[129] which characterized ministerial discretion as subjective and thus, immune from judicial control. *Lee Mau Seng* rested on the now heavily criticized House of Lords case of *Liversidge v. Anderson*.[130] Wartime cases are decided when there is a heightened sense of security; in *Liversidge*, which was decided in the midst of World War II, Lord Atkin famously dissented and chided his peers for being "more executive minded than the executive."[131]

After extensively discussing case law from England, Malaysia, Brunei, Caribbean, Zimbabwe, Sri Lanka, South Africa, and other Privy Council decisions that bolstered its own conclusions, the Court of Appeal concluded that ministerial discretion under the ISA was subject to an objective test of review. The Court of Appeal said:

> However, having heard the extensive arguments and in the light of the decisions cited to us of the highest courts in many Commonwealth countries and of the Judicial Committee of the Privy Council in recent years, we agree with the submission by counsel for the appellants that it is the objective test that is applicable to the review of the exercise of discretions under [Sections] 8 and 10. In our judgment, the time has come for us to recognize that the subjective test in respect of [Sections] 8 and 10 of the ISA can no longer be supported. First, we accept the contention that *Karam Singh*, [2 Malay. L.J. 129 (1969)], and its progeny can no longer be said to be good law in so far as the decision in *Karam Singh*...had applied the case of *Liversidge v. Anderson*, [[1942] A.C. 206 (U.K.)], and its companion case *Greene v. Secretary of State for Home Affairs*, [[1942] A.C. 284 (U.K.)]. The House of Lords has, in recent years, recognized that the majority judgments in both the latter cases were wrong, preferring instead the strong dissenting judgment of Lord Atkin.[132]

---

[129] *See* Lee Mau Seng v. Minister of Home Aff., 2 MALAY. L.J. 137 (1971) (considering two Indian cases cited by defense counsel David Marshall before concluding that these were inapplicable in Singapore, owing to the material differences in their respective constitutional texts).
[130] *See* Liversidge v. Anderson, [1942] A.C. 206 (U.K.).
[131] *Id.* (Atkin, L., dissenting).
[132] *See Chng Suan Tze*, 1 SING. L. REP. at 149.

The Court of Appeal noted that the trend, even in Malaysian cases, was towards applying an objective test of review on pragmatic grounds.[133] After reviewing various Privy Council cases, it stated, "We agree with judicial opinion expressed in other jurisdictions, to the effect that the court can objectively review the President's exercise of discretion in the context of preventive detention on national security grounds."[134] As a matter of principle, the Court of Appeal found that if the ministerial discretion under Sections 8 and 10 of the ISA were immune from judicial review, then on the basis of the Article 12 Equal Protection Clause, "that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive."[135]

Apart from the global trend of case law signaling a shift to an objective test of review, the Court of Appeal based its decision on the solid rock of principle, declaring:

> There is one other reason for rejecting the subjective test. In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be ultra vires the Act and a court of law must be able to hold it to be so.[136]

Notably, the Court of Appeal was not indulging in unwonted judicial activism as it recognized, pursuant to the doctrine of justiciability imported from the English GCHQ Case,[137] that the judiciary should not transgress the executive realm when sensitive political issues were involved. In fact, the Federal Malaysian Court in *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara*[138] followed *Chng* in finding that the

---

[133] *See, e.g.*, *Re* Tan Sri Raja Khalid, 1 MALAY. L.J. 133, 152 (1988).
[134] *See id.* at 152. *See, e.g.*, Minister for Home Aff. v. Austin, 1 Zimb. L. Rep. 240 (Sup. Ct. 1986); Katofa v. Adm'r Gen. for S.W. Afr., 1985 (4) S.A. 211 (S. Afr.); Att'y Gen. of St. Christopher, Nevis S. Anguilla v. Reynolds, [1980] A.C. 637 (U.K.).
[135] *Tan Sri Raja Khalid*, MALAY. L.J. at 155.
[136] *Id.* at 156.
[137] C.C.S.U. v. Minister for Civ. Serv. (*The GCHQ Case*), [1985] A.C. 374 (U.K.).
[138] *See* Mohamad Ezam bin Mohd Nor v. Ketua Polis Negara, 4 MALAY. L.J. 449, 468 (Kuala Lumpur, Fed. Ct. 2002).

test of review is objective under Section 73 of the ISA (dealing with police powers), although the subjective test continues to apply for ISA Section 8 powers exercised by the minister.

Nevertheless, Parliament took expeditious action to overturn this case through constitutional and statutory amendments passed within a month of the judgment. These amendments effectively truncated the judicial review of ISA cases to narrow procedural grounds, reinstating the subjective test by declaring the applicable law dated back to May 13, 1971, the date *Lee Mau Seng* was decided. Appeals to the Privy Council from ISA cases were also barred. Law Minister Jayakumar explained that the purpose of the constitutional amendment bill[139] was to restore the law on judicial review to "what it was before the recent Court of Appeal judgment on 8th December 1988."[140] By arrogating for itself the power to question detention decisions, Minister Jayakumar argued, "The end result will be a substitution of the judgment of the courts for the judgment of the Executive. That is the end practical result."[141]

He further seemed to imply that the court was subject to foreign developments, which formed the basis of their decision: "the Court did so because of cases decided in the United Kingdom and other parts of the Commonwealth."[142] He noted that British judges had adopted an "interventionist approach" in reviewing executive actions, disregarding the clear statutory intent by going "behind the decisions of the Executive," especially for national security cases.[143] These developments in Britain and other Commonwealth jurisdictions were imported into Singapore even though they were based on considerations "totally unconnected with our country and our society."[144] He asserted that the Court of Appeal had "no choice" but to apply these interventionist decisions because "if our courts were to ignore such precedents, the Privy Council in the United Kingdom can and probably will overrule our Court of Appeal."[145] This suggestion that the Court of Appeal succumbed to the pressure of reasoning in foreign decisions goes against the tenor of the principled decision in *Chng* and the desire to cultivate a robust conception of the rule of law that promoted government accountability.

If Parliament did not stem the tide, Jayakumar argued that Singapore's law on national security matters would be "governed by

---

[139] Constitution of the Republic of Singapore (Amendment) Bill, 52 SING. PARL. DEB. at col. 463 (Jan. 25, 1989).
[140] *Id.*
[141] *Id.* at col. 466.
[142] *Id.*
[143] *Id.* at col. 467.
[144] *Id.*
[145] *Id.*

cases decided abroad, in countries where conditions are totally different from others."[146] Furthermore, British law and judicial thinking was affected by the U.K.'s

> entry into the European Community and decisions of the European Court which are factors totally alien to us. The European Court has no concern whatsoever to Singapore. But their law is binding on U.K. courts. It will influence the U.K. judges and those precedents will be then imported into Singapore.[147]

Secondly, ill-equipped judges lacking security expertise would have the "final say" on security decisions. Clearly, these amendments were designed to terminate the brief judicial flirtation with foreign case law, particularly from the European Court of Human Rights, which might buttress the development of a rights-based jurisprudence.

Chastened, judicial review took on a far more muted role towards foreign decisions, citing these only where they bolstered the government's position. For example, in *Teo Soh Lung v. Minister of Home Affairs*, Judge Chua held that the 1989 amendments effectively reinstated the subjective test in dismissing a habeas corpus application.[148] He rejected the argument that the amendments unconstitutionally violated the separation of powers, which was asserted to be a non-derogable "basic feature" of the Singaporean Constitution, borrowing from the Indian Supreme Court decision of *Kesavananda Bharathi v. Union of India*.[149] Judge Chua preferred the dissent of Judge Ray in *Kesavananda* and noted that various Malaysian cases had rejected the application of the basic features doctrine.[150] After deciding this doctrine did not apply to Singapore, for good emphasis, he nevertheless applied it by saying the amendments did not affect any basic feature!

2. The Turn towards Autochthony and "Local or Asian Values"

In a turn towards developing a more autochthonous legal system, appeals to the Privy Council from both countries were abolished.[151] In

---

[146] *Id.* at col. 468.
[147] *Id.*
[148] Teo Soh Lung v. Minister of Home Aff., 2 MALAY. L.J. 449 (1989).
[149] Kesavananda Bharathi v. Union of India, A.I.R. 1973 S.C. 1461 (India).
[150] *See* Phang Chin Hock v. Pub. Prosecutor, 1 MALAY. L.J 70 (1980).
[151] In Malaysia, appeals to the Privy Council in criminal and constitutional matters were terminated in 1978 and in 1985 for civil matters. Singapore abolished Privy Council appeals in all cases save

the context of the international arena, government elites began to champion the "Asian values" school as an alternative law and development model to that of western liberal democracy, emphasizing social discipline rather than democracy as the precursor for economic growth; it underscored the legitimacy of cultural particularism, which informed the understanding of human rights within a neo-communitarian context, where group interests trumped individual rights and consensus and harmony were valorized over contention and potential destabilization. Often, this served to buttress the supremacy of statist imperatives, supported by judicial deference.[152]

In 1994, when Singapore cut off appeals to the Privy Council, a Practice Statement on Judicial Precedent was issued.[153] This provides that while their decisions did not bind the Court of Appeal, they would be departed from sparingly. However, in taking note of the enormous changes in the "political, social and economic circumstances of Singapore" since Independence, it asserted that "the development of our law should reflect these changes and the fundamental values of Singapore society." The Court of Appeal reiterated this in 2004 stating, "The common law of Singapore has to be developed by our Judiciary for the common good."[154] In terms of developing the common law, it is clear that Singapore judges will shape this to fit the dictates of local particularities and values, which may fairly be said to be reticent towards the expansive construction of fundamental liberties, given the prioritization of public order concerns in public law jurisprudence.[155]

D. Attitude towards International Human Rights Law and Foreign Case Law in an Age of Globalization: Going "Global"?

In the 2004 case of *Nguyen Tuong Van v. Public Prosecutor* before the Singaporean High Court concerning the imposition of a mandatory death sentence for drug trafficking, defense counsel argued:

---

those involving the death penalty or in civil cases where the parties had agreed to a right of appeal in 1989. All rights of appeal were abolished in 1994.

[152] *See, e.g.*, Li-ann Thio, *An i for an I: Singapore's Communitarian Model of Constitutional Adjudication*, 27 H.K.L.J. 152 (1997); Benedict Sheehy, *Singapore "Shared Values" and Law: Non-East versus West Constitutional Hermeneutic*, 34 H.K.L.J. 67, 73 (2004).

[153] *Practice Statement (Judicial Precedent)*, 2 SING. L. REP. 689 (1994) (issued Jul. 11, 1994).

[154] Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. 103, 126 (C.A. 2005).

[155] This is evident from recent cases like *Chee Siok Chin v. Minister of Home Affairs*, 1 SING. L. REP. 582 (High Ct. 2006).

> Singapore's vital participation in the world of transnational trade and commerce necessarily connects it to the influence of international standards and that they in turn must affect Singapore's domestic or municipal law.[156]

This appeal to the influence of human rights law, in particular of customary law norms prohibiting the imposition of cruel, inhuman, and degrading treatment, stands in stark contrast to an extra-judicial comment made by Singaporean Chief Justice Yong Pung How: "I am not concerned with international law. I am a poor humble servant of the law in Singapore. Little island."[157] This parochial sentiment was expressed in relation to an article first published in the Law Gazette that argued that the death penalty was unconstitutional for contradicting international law.[158]

The susceptibility of a legal system to transnational influences on constitutional interpretation where cultural particularism or literalism (textualism) predominates is significantly diminished. This non-liberal approach is evident from a study of certain Malaysian and Singaporean public law cases, where sentiments such as that expressed by the Norwegian Chief Justice, stating, "it is the duty of national courts...to introduce new legal ideas from the outside world into national judicial decisions"[159] strike a discordant note and sound a strange and alien tongue in the face of a dogged adherence to local values. However, this is not an entirely accurate picture for various reasons, as judiciaries do not work in hermetically sealed environments, immune from external influences. The traditional hostility of common law courts towards international law and their adherence to nationalism in terms of orientation may be due to the lack of an express constitutional provision importing in international law.[160] Furthermore, these jurisdictions do not recognize self-executing treaties, which means that for treaties to take effect in the municipal

---

[156] Nguyen Tuong Van v. Pub. Prosecutor, 2 SING. L. REP. 328, 360 (2004); *see also* Li-ann Thio, *The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in Public Prosecutor v. Nguyen Tuong Van*, 4 OXFORD UNIV. COMMONWEALTH L.J. No. 2, at 213-26 (2004) (case critique); C.L. Lim, *The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v. Pub. Prosecutor*, 1 SING. J. LEGAL STUD. 218 (2005).

[157] [*Chief Justice*] *on Death Penalty*, STRAITS TIMES, Oct. 1, 2003 (Sing.).

[158] *See* K.S. Rajah, *The Death Sentence*, LAW GAZETTE, Feb. 2003 (Sing.). For further discussion, see K.S. Rajah, *The Unconstitutional Punishment*, 3 MALAY. L.J. cxlviii (2003).

[159] Carsten Smith, *The Supreme Court in Present-day Society*, *in* THE SUPREME COURT OF NORWAY 96, 135 (Stephan Tschudi-Madsen ed., 1998).

[160] *Contra* S. AFR. CONST. § 39(1) (1996) (enjoining the courts to have regard to such jurisprudence where applicable to interpret freedoms).

order, Parliament must enact enabling legislation. Otherwise, treaties cannot be a source of rights and obligations.[161] Consistent with this, the Malaysian High Court in *Kok Wah Kuan v. Pengarah Penjara Kajang, Selangor Darul Ehsan*,[162] discussing two Privy Council cases based on Article 6 (fair trial) of the European Convention on Human Rights,[163] noted that Article 40 of the Convention of the Rights of the Child ("CRC"), to which Malaysia was a party, was similar to Article 6. However, in affirming a strict dualist approach, the court noted that CRC had not been incorporated into Malaysian municipal law and hence was still within the realm of the Executive and external affairs. For the High Court to apply this provision would not be interpretation but rather "judicial vandalism or judicial trespass."[164]

However, this resistance towards international law may be eroding. For example, both Singapore and Malaysia acceded to three human rights treaties in 1995: CRC, the Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW"), and the Genocide Convention.[165] Indeed, the Malaysian Constitution was amended in 2001 to include "gender" as a prohibited ground of discrimination.[166] Although Singapore acceded to CEDAW at the same time, it has created no oversight institution nor introduced any laws expressly prohibiting gender discrimination, although it has begun to participate in the state reporting process.[167]

Non-binding resolutions such as the Universal Declaration of Human Rights ("UDHR") have no legal force in national law,[168] unless they embody customary international law. It appears that Singaporean

---

[161] Both Singapore and Malaysia practice a dualist approach towards treaties, which must be incorporated by an act of parliament before becoming judicially binding. *See* Pub. Prosecutor v. Narongne Sookpavit, 2 MALAY. L.J. 100 (1981); Taw Cheng Kong v. Pub. Prosecutor, 1 SING. L. REP. 943, 969 (1998).

[162] Kok Wah Kuan v. Pengarah Penjara Kajang, Selangor Darul Ehsan, 5 MALAY. L.J. 193 (Kuala Lumpur, High Ct. 2004).

[163] *See* Dir. of Pub. Prosecutors of Jam. v. Mollison, (2003) 2 W.L.R. 1160 (Eng.); R. (Anderson) v. Sec'y of State for Home Dep't., (2002) 3 W.L.R. 1800 (Eng.).

[164] *Kok Wah Kuan*, 5 MALAY. L.J. at 224.

[165] Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49/Annex (Nov. 22, 1989); Convention for the Elimination of All Forms of Discrimination against Women, G.A. Res 34/180, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res 260A(III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (Dec. 9, 1948). Ratification information available at website of U.N. High Commissioner for Human Rights, http://www.unhchr.ch.

[166] *See* Asia Social Issues Program, *Step Forward for the Women of Malaysia*, Asia Society, *at* http://www.asiasource.org/asip/sis.cfm.

[167] *See* Li-ann Thio, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & the Transformative Potential of CEDAW*, 1 SING. J. INT'L & COMP. L. 278, 299-305 (1997).

[168] Malaysian courts have explicitly stated that such declarations are not binding within the domestic order. *See* Merdeka Univ. Berhad v. Gov't of Malay., 2 MALAY. L.J. 356, 366 (1981).

courts will directly apply recognized customary international norms, except where contrary to a statute.[169] In *Nguyen Tuong Van v. Public Prosecutor*, the Singaporean Court of Appeal, while accepting that Article 5 of UDHR embodied customary international law, found that death by hanging did not fall within the scope of the prohibition: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" constituting a deprivation of life not "in accordance with law."[170] To this end, the court cited the U.S. Ninth Circuit Court of Appeals case of *Campbell v. Woods*,[171] which held that hanging did not violate the U.S. constitutional prohibition against cruel and unusual punishments, indicating that no general consensus on this putative customary human rights norm existed.[172] Further, the Court of Appeal referred to a 2003 U.N. Commission on Human Rights report which noted that there was no universal consensus over the status of the death penalty worldwide, with the number of countries retaining the death penalty (primarily effected by hanging or shooting) roughly equal to abolitionist countries.[173] Thus, the putative customary international norm failed the test of being "clearly and firmly established," the requirement for Singaporean courts' adoption.[174] Clearly, this is active judicial engagement with the sources of international law. This represents a marked improvement from the terse treatment of UDHR norms in *Colin Chan v. Public Prosecutor*. In this case, such norms that might embody customary international law were raised in relation to the argument that administrative orders violated not only constitutional but human rights law in international declarations; however, the court rejected this argument, stating, "I think the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the U[ndesirable] P[ublications] A[ct] alone."[175] This statement conveyed the impression of a dualistic approach towards customary international

---

[169] *See* Nguyen Tuong Van v. Pub. Prosecutor, 2 SING. L. REP. 328 (High Ct. 2004) (approving the approach at page 360 that the statute would prevail because customary law is incorporated into domestic law "so far as it is not inconsistent with rules enacted by statues or finally declared by...tribunals" (quoting Chung Chi Cheung v. King, [1939] A.C. 160 (U.K.) (Atkin, L.)), *aff'g* 1 SING. L. REP. 103, 112-14 (C.A. 2005) (affirming that unambiguous statutes took precedence even where inconsistent with international law, asserting the supremacy of domestic law over international norms (citing Collco Dealings v. Inland Revenue Comm'rs, [1962] A.C. 1 (U.K.)).

[170] SING. CONST. pt. IV, art. 9.

[171] *See* Campbell v. Woods, 18 F.3d 662 (9th Cir. 1994).

[172] *Nguyen*, 2 SING. L. REP. at 360 (High Ct.).

[173] *Status of the International Covenants on Human Rights, Question of the Death Penalty*, Sec'y Gen. Rep., U.N. COMM'N ON H.R., 59th Sess., U.N. Doc. E/CN.4/2003/106.

[174] Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. 103, 126-27 (C.A. 2005).

[175] Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662, 682 (High Ct. 1994).

law, implying that the latter needs to be formally incorporated into the domestic system before being applicable.

The Malaysian High Court in examining international instruments has attributed marginal weight to U.N. General Assembly Resolutions, specifically to UDHR and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. The latter was found to be "only declaratory in nature" and not legally binding.[176] When UDHR was invoked as a relevant international standard to apply to Article 5(3) in reference to a detained person's right of access to legal counsel in *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negera*,[177] the counter-argument was that this document was not legally binding on Malaysian Courts. In *Merdeka University v. Government of Malaysia*,[178] UDHR was described as a non-legally binding instrument because some of its provisions departed from existing and generally accepted rules: "It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law." This discounts the fact that UDHR may embody general customary international law. The Federal Court in 2002 considered that Section 4(4) of the Human Rights Commission of Malaysia Act (1999)[179] did not affect the "status and weight" to be given UDHR, which was a General Assembly resolution rather than a binding treaty:

---

[176] Mohamad Ezam bin Mohd Nor v. Menteri Dalam Negeri, 2 MALAY. L.J. 364 (2003). *See also Nguyen*, 2 SING. L. REP. at 358 (High Ct.) (entirely discounting non-binding instruments like the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region that have been signed by Asian Pacific Chief Justices as having legal weight).

[177] *See* Mohamad Ezam bin Mohd Noor v. Ketua Polis Negera, 4 MALAY. L.J. 449 (Kuala Lumpur, Fed. Ct. 2002) (referring to two documents—Standard Minimum Rules for the Treatment of Prisoners (1977) and Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment—adopted by the U.N. General Assembly as forming international standards insofar as these related to the right to counsel of accused or detained persons). For a comment, see John D. Ciorciari, *A Half-Way Challenge to Malaysia's Internal Security Act (Mohamad Ezam Bin Mohd Nor v. Ketua Polis Negara)*, 3 OXFORD UNIV. COMMONWEALTH L.J. No. 2, at 237 (2004). *See also* Gopal Sri Ram's Address, *supra* note 53 (noting that the observation in *Ezam* about the non-binding quality of the UDHR was merely obiter, not central to the judicial decision-making process; further, noting that the approach "probably reflects the lack of carefully prepared and well-directed submissions on the issue by counsel who argued the case," given the lack of reference to leading cases on the point), *available at* http://www.mlj.com.my/free/articles/gopalsriram.htm.

[178] Merdeka Univ. v. Gov't of Malay., 2 MALAY. L.J. 356, 366 (1981).

[179] Human Rights Commission of Malaysia Act, 1999, ACT NO. 597, § 4(4) ("Regard shall be had to the Universal Declaration of Human Rights 1948 to the extent it is not inconsistent with the Federal Constitution."). The wording "shall" and not "may" would appear to impose a mandatory obligation, rather than being directory in nature. *Cf.* Gopal Sri Ram's Address, *supra* note 53 (observing that the reference to "inconsistency" can be answered through a "prismatic" interpretation of the Constitution as "Part II liberties are entirely consistent with the terms of the 1948 Declaration"). Of course, the acceptance of this approach must await a future case.

> By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. Since such principles are only declaratory in nature, they do not, I consider, have the force of law or bind member states. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law.[180]

This Act provided that "regard should be had" by the Human Rights Commission to international standards contained in UDHR. Federal Court of Malaysia Judge Yaakob construed this as merely being "an invitation to look at the 1948 Declaration if one was disposed to do so and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration."[181] This restrictive reading was buttressed further by the qualifying statutory provision that UDHR should be considered "subject to the extent it was not inconsistent with the Constitution."[182]

III. CONSTITUTIONAL ADJUDICATION TO SHORE UP THE FOUR WALLS

Comparative and international case law can be used "positively" to develop normative reasoning or negatively to buttress particularist values that denude the quality of rights protection. Parts III and IV of this Article examine the use of transnational sources to either buttress or transcend the four walls in terms of constitutional text and cultural context.

---

[180] Mohamad Ezam bin Mohd Nor v. Ketua Polis Negara, 4 MALAY. L.J. 449, 513-14 (Kuala Lumpur, Fed. Ct. 2002) (Siti Norma Yaakob, Fed. Ct. J., concurring).

[181] *Id.*

[182] *But see* Gopal Sri Ram's Address, *supra* note 53 (criticizing that "this approach probably reflects the lack of carefully prepared and well-directed submissions on the issue by counsel who argued the case. This is to be gathered from the lack of reference to any of the several leading cases on the point. In any event, the observation in *Ezam* is merely obiter, for, as appears from the quoted passage, the point about the applicability of the 1948 Declaration played no part in the decision making process in that case").

A. *Cultivating Uninformed Parochialism*

Certain courts have demonstrated a dismissive attitude towards transnational sources by postulating the sufficiency of domestic law and sources to resolve the problem at hand, without examining foreign sources in any significant detail. The Court in *Merdeka University* in ignoring UDHR declared "...in any event the pertinent provisions for consideration are those contained in our municipal legislation."[183]

So too, Chief Justice Yong in *Colin Chan v. Public Prosecutor* displayed a lack of in-depth appreciation in rejecting U.S. case law owing to the "fundamental difference" between the freedom of religion under the First Amendment of the U.S. Constitution and Article 15 of the Singaporean Constitution.[184] While the First Amendment had an Establishment Clause by which the state is not to prefer any religion,[185] Chief Justice Yong stated, "Significantly, the Singaporean Constitution does not prohibit the 'establishment' of any religion." This is rather puzzling, as it appears to have nothing to do with the issue at hand. He further overstated the effect of the Free Exercise Clause, which was "based on the principle of government non-interference with religion," as clearly being that the government does regulate religion. It may have been useful to consider how foreign judges grapple with similar issues in order to gain insight from how similar problems in different jurisdictions are addressed. Furthermore, *sans* elaboration, Chief Justice Yong noted that the "social conditions" in Singapore were "markedly different" from that in the U.S., concluding, as a *non sequitur*, "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."[186]

Judges have also considered international standards superfluous. In *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negera*, the court in reading Article 5(3) of the Malaysian Constitution did not find helpful the

---

[183] *Merdeka*, 2 MALAY. L.J. at 366.

[184] *See* Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662, 682 (High Ct. 1994). In this case, Chief Justice Yong compared the First Amendment of the U.S. Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.") with Part IV, Article 15(1) of the Singaporean Constitution (providing that "Every person has the right to profess and practise his religion and to propagate it"). *See* U.S. CONST. amend. I; SING. CONST. pt. IV, art. 15(1). Note that this Part of the Singaporean Constitution is qualified by Clause (4) which reads, "This Article does not authorise any act contrary to any general law relating to public order, public health or morality." SING. CONST. pt. IV, art. 15(1), cl. 4. The Singaporean Constitution also provides that no person should be compelled to pay taxes to a religion other than his own and recognizes the right of religious groups to manage their own religious affairs, to hold property, and to maintain institutions.

[185] U.S. CONST. amend. I.

[186] *Colin Chan*, 3 SING. L. REP. at 662.

reference to UDHR, which related to standards for the treatment of prisoners. Such international standards were of limited "persuasive value and assistance" as "our own laws backed by statutes and precedents as seen from the cases that I have spelt out in this judgment are sufficient for this court to deal with the issue of access to legal representation."[187]

B. *Engaged Particularism: Rejecting Normative Values and Premises*

Courts in other instances have engaged with transnational sources not to emulate their values, but to solidify cultural particularisms by rejecting the normative values and premises of foreign decisions. For example, Judge Lai Kew Chai in *Lee Kuan Yew v. Jeyaretnam JB (No. 1)*[188] rejected the public policy underlying the American approach to free speech on the basis that it was "so extensive" and discordant with Singaporean values. He noted that in *Texas v. Johnson*,[189] flag burning was held to be constitutional speech:

> I agree that the divergence of public policy between that underlying our [Article] 14 and that underlying Amendment I of the United States [Constitution] could not be clearer. By [Article] 14, the framers of our Constitution had after all deliberate considerations chosen the policy of balancing freedom of speech and expression against certain other individual rights, including not least the protection of reputation...that balance is sought to be achieved in England and in Singapore by the common law evolving certain well known defences, as modified by statute, for defendants in defamation cases, and all directed to the intent and purpose that freedom of speech must end where the rights of the individual begin. In *Lingens v. Austria* at [paragraph] 41, second part, the European Court of Human Rights in terms clearly recognized that the press was bound by legal obligations in relation to the reputation of individuals.[190]

---

[187] Mohamad Ezam bin Mohd Nor v. Ketua Polis Negara, 4 MALAY. L.J. 449, 513 (Kuala Lumpur, Fed. Ct. 2002) (Siti Norma Yaakob, Fed. Ct. J., concurring).
[188] Lee Kuan Yew v. Jeyaretnam JB (No. 1), 1 SING. L. REP. 688 (1990).
[189] *See* Texas v. Johnson, 491 U.S. 397 (1989).
[190] *Jeyaretnam JB (No. 1)*, 1 SING. L. REP. at 706.

Overvaluation of speech was the basis for rejecting U.S. jurisprudence, in very general terms. This appeal to normative differences or values is particularly apparent in relation to the treatment of political libel and contempt of court before Singaporean courts.

1. The Importance of Preserving Reputation: Libel and Contempt

The balancing of free speech against competing interests, like the reputations of public institutions and politicians, is an area that lends itself to comparative analysis. Developments in Commonwealth jurisdiction indicate that in adjudicating these issues, a greater weight is being accorded to free speech in recognition of its centrality to a democratic society. This is particularly in relation to political speech, which is critical of politicians or the judiciary. However, the converse appears to be true in Malaysia and Singapore, where reputational interests are prioritized. Foreign decisions have thus far not been persuasive in enhancing the protection to the speaker, although the courts do robustly engage with foreign decisions, not to adopt their reasoning, but to reject them on various grounds. The basis for rejection relates to differences in the textual formulation of rights and the assertion of cultural or contextual particularities mandating enhanced protection for the public reputations of politicians and courts. The latter is justified based on the "local conditions" argument. This explains why there is a uniform rejection of "rights-based" cases that seek to recognize the importance of speech in democratic societies and seek to "constitutionalize" rights by revisiting the balance in relation to common law speech rights and reputational interests struck in past cases, decided prior to the adoption of constitutional rights.

2. Applying the English Law of Contempt

In Malaysia, the English common law principles of contempt of court apply by virtue of Section 3 of the Civil Law Act of 1956.[191] The rationale of this application is to ensure the proper administration of justice. In relation to the offense of scandalizing the court through acts or

[191] *See, e.g.*, Att'y Gen. v. Manjeet Singh Dhillon, 1 MALAY. L.J. 167 (1991) (Mohamad Yusoff, J., concurring) ("The principle of common law of contempt as stated in *R. v. Gray* [(1900) 2 Q.B. 36 (Eng.)] still applies in our country. Parliament has not imposed any restriction by law relating to contempt of court under [Article] 10(2) of the Constitution. As such the common law provision under [Section] 3 of the Civil Law Act 1956 is preserved."). *See also* Civil Law Act, 1956, ACT NO. 67 (revised 1972) (Malay.).

words calculated to lower judicial authority, the test applied is that of the 1900 case of *Regina v. Gray*, which recognizes that "if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."[192]

The courts have seemingly disregarded the fact that English law developed without a commitment to constitutional free speech rights.[193] The courts, while acknowledging the need to attain a "proper balance" between the constitutional guarantee of free speech and protecting the dignity and integrity of Superior Courts to maintain public confidence in the judiciary, have indicated that local conditions require a modification of the English approach insofar as it is necessary to take a "stricter view...of matters pertaining to the dignity of the court."[194]

3. Localizing the English Common Law Offense through Enhanced Protection of Judicial Reputation

In *Attorney General v. Arthur Lee Meng Kuang*, the court said that speech "within the limits of reasonable courtesy and good faith" was protected, to be ascertained on the facts of the case.[195] It stated that "the courts should not however lose sight of local conditions" or follow English decisions too closely "without first considering whether the relevant conditions in England and this country are similar."[196] Notably, the Privy Council in the 19th century case of *McLeod v. St. Aubyn*[197] (followed in Malaysia and Singapore)[198] stated that the offense of scandalizing the court was obsolete in England but "surviving in other parts of the Empire."[199]

---

[192] R. v. Gray, (1900) 2 Q.B. 36, 40 (Eng.). *See also* Att'y Gen. v. Wain (No. 1), 2 MALAY. L.J. 525 (High Ct. 1991) (endorsing this test).

[193] The English have an unwritten constitution that operates under the principle, with respect to civil liberties, that citizens "may engage in any activity not prohibited by statute or common law." IAN LOVELAND, CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION 517 (2nd ed. 2000). Civil liberties are thus residual concepts.

[194] Att'y Gen. v. Arthur Lee Meng Kuang, 1 MALAY. L.J. 206, 208 (1987).

[195] *Id.* at 208.

[196] *Id.* (citing Pub. Prosecutor v. SRN Palaniappan, 1 MALAY. L.J. 246 (1949)).

[197] McLeod v. St. Aubyn, [1898] A.C. 549 (P.C.) (U.K.).

[198] *See* Att'y Gen. v. Manjeet Singh Dhillon, 1 MALAY. L.J. 167 (1991); Att'y Gen. v. Wain (No. 1), 2 MALAY. L.J. 525 (High Ct. 1991).

[199] *See also* Debi Prasad Sharma v. Emperor A.I.R. 1943 P.L. 202, 204 (Atkin, L.) (India), *cited in Manjeet Singh Dhillon*, 1 MALAY. L.J. at 175.

One local condition particular to Malaysia was the greater vulnerability of the Supreme Court due to its relative youth. As Supreme Court Judge Azmi noted in *Arthur Lee*:

> The Supreme Court was given birth only on 1 January 1985, and its sensitivity need not be the same as courts of similar jurisdiction in England or other countries. Having regard to local conditions, criticisms which are considered as within the limit of reasonable courtesy elsewhere are not necessarily so here. For the present, except possibly—and we say this with great reservation—for the limited purpose of proving it in actual court proceedings, any allegation of injustice or bias however couched in respectful words and even if expressed in temperate language, cannot be tolerated particularly when such allegations are made for the purpose of influencing or exerting pressure upon the court in the exercise of its judicial functions.[200]

This would seem to suggest that only a relatively modest margin for speech critical of the judiciary would escape being cited for contempt, given its extra sensitivity. One might note that public confidence in the judiciary can be eroded not merely by criticism but by the absence of criticism in the face of genuine concerns about malfeasance.

4. Rejecting Foreign Cases Protective of Robust Free Speech

The Malaysian Supreme Court in *Attorney General v. Manjeet Singh Dhillon* considered case law from the U.S., Canada, Pakistan, and India. While noting that the Pakistan Constitution conferred power on the High Court to punish any person who scandalizes the court and was "more protective of judges than under the common law," the court noted that the preservation of the common law position under Article 19 of the Indian Constitution made Indian decisions "persuasive authority" in Malaysia.[201] Supreme Court Judge Harun rejected American decisions because the First Amendment of the U.S. Constitution was couched absolutely and "guarantees freedom of speech to the extent that it cannot

[200] Att'y Gen. v. Arthur Lee Meng Kuang, 1 MALAY. L.J. 206, 209 (1987).
[201] *Manjeet Singh Dhillon*, 1 MALAY. L.J. at 176.

even be restricted by legislation."[202] Thus, the American test permits more extensive criticism of judges than what the English test allows.

5. Rejecting Arguments to "Constitutionalize" Contempt Laws by Enhancing Free Speech Protection

Furthermore, while an English decision made at the turn of the 20th century was considered useful,[203] the Supreme Court in *Dhillon* did not treat as authority the Ontario Court of Appeal case of *Regina v. Kopyto*,[204] which was decided after the Charter Canadian Charter of Rights and Freedoms came into force.[205] In *Kopyto*, free speech rights were "read up" and accorded greater weight in recognition of their constitutionalized status in quashing the conviction of a lawyer by a trial court for scandalizing the court because the statements were now protected by the free expression guarantee. Supreme Court Judge Harun stated, "This reasoning will not apply here in view of [Article] 10(2) of the Constitution and [Section] 3 of the Civil Law Act 1956."[206] Similarly, *Kopyto* was rejected by the Singaporean High Court in *Attorney General v. Wain*,[207] in which the High Court endorsed the balance struck between institutional reputation and free speech in cases where the latter was regarded as a common law residual liberty, rather than a constitutional right.

This is disconcerting as *Kopyto* represents an attempt to calibrate upwards the value of constitutional guarantees of free speech and to recognize the important role free speech plays in promoting democratic debate. The Malaysian and Singaporean courts assume that the common law offense of scandalizing the court is consistent with free speech guarantees, ignoring the fact that this offense was formulated for immature and uneducated societies, which is why it was phased out in England. In *McLeod v. St. Aubyn*, the Privy Council observed pejoratively that this offense should be retained "in small colonies, consisting principally of coloured populations," as it may be "absolutely necessary to preserve in such a community the dignity of and respect for the Court."[208] This reasoning is unacceptable for an independent state with an educated electorate. Nevertheless, Supreme Court in *Dhillon*

---

[202] *Id.*
[203] *See* R. v. Gray, (1900) 2 Q.B. 36 (Eng.).
[204] *See* R. v. Kopyto, [1987] 47 D.L.R. (4th) 213 (Can.).
[205] This came into force by the Constitution Act of 1982. Constitution Act, 1982, ch. 11 (U.K.).
[206] *Manjeet Singh Dhillon*, 1 MALAY. L.J. at 176.
[207] Att'y Gen. v. Wain (No. 1), 2 MALAY. L.J. 525 (High Ct. 1991).
[208] McLeod v. St. Aubyn, [1899] A.C. 549, 561 (U.K.).

took pains to note that scandalizing the court was still an offense punishable in New Zealand, "another Commonwealth country with a common law background."[209]

Supreme Court Judge Gunn Chit Tuan in *Dhillon* saw no need to constitutionalize the Malaysian law of contempt because Malaysian "social conditions" were "very different from those in England and more alike those in an Asian country within the Commonwealth such as India"; without further elaboration, he concluded the offense should continue until the legislature decided to "make such power obsolete."[210]

The appeal to local conditions to dismiss the relevance of foreign case law was particularly evident in Judge Sinnathuray's judgment in the leading Singaporean case of *Attorney General v. Wain (No. 1)*.[211] The court found contempt punishable under the terms of Section 8(1) of the Supreme Court of Judicature Act ("SCJA").[212]

The common thread amongst the relevant foreign cases from England and the Commonwealth, whose reasoning Judge Sinnathuray rejected, was that they all espoused a stronger commitment to protecting rights. He proposed to "clear the decks" in explaining why the foreign cases were dismissed. First, in relation to English cases, he noted that post-1981 decisions were "of no guidance to me" as Singapore's "law of contempt of court is derived from the common law of England before major changes were affected to this law by statute in England."[213] Because the 1981 Contempt of Court Act[214] amended the English common law, Judge Sinnathuray proposed to apply the common law frozen at 1981; notably the 1981 Act was introduced following a European Court of Human Rights decision that English contempt law contravened Article 10 of the European Convention on Human Rights, and its design was to afford greater protection to freedom of speech, although the Convention was not yet incorporated into the U.K. He wanted to curb any rights-based influences originating from the European Court as "the United Kingdom is now bound by the decisions of the

---

[209] *Manjeet Singh Dhillon*, 1 MALAY. L.J. at 181 (citing *Re* Wiseman, [1969] N.Z.L.R. 55). The New Zealand Bill of Rights did not come into being until 1990 and affirmed the country's commitment to the International Covenant on Civil and Political Rights.

[210] *Manjeet Singh Dhillon*, 1 MALAY. L.J. at 182.

[211] *See Wain*, 2 MALAY. L.J. at 525. This pertained to remarks of Dow Jones President published in the *Asian Wall Street Journal* critically commenting on the decision on a libel case, which the Attorney General contended created the impression that the Singaporean judiciary was biased and could be influenced in the case because the plaintiff was the Prime Minister. *See Singapore Prime Minister, Lee Kuan Yew, has won a libel suit against the Far Eastern Economic Review*, ASIAN WALL ST. J., Dec 1-2, 1989, at 3.

[212] Supreme Court of Judicature Act, 1969, ch. 322 (revised 2005) (Sing.).

[213] *Wain*, 2 MALAY. L.J. at 531.

[214] Contempt of Court Act, 1981, ch. 49 (U.K.).

European Court of Human Rights."[215] This and the 1981 Act had shifted the development of the contempt of scandalizing the court "in a liberal direction."[216]

Second, Judge Sinnathuray dismissed "recent decisions" from Canada as "not useful authorities in Singapore" because they were no longer based on the common law, but rather upon the "Canadian Charter of Rights and Freedoms which has no parallel in Singapore."[217] He conveniently ignored the fact that the entrenchment of free speech rights in Canada made Canadian cases potentially more persuasive because Article 14 of the Singaporean Constitution affords constitutional status to free speech. His treatment was unsatisfying, superficial, and deficient. This is highly problematic since it is the judicial reasoning used to inform the balance of rights and restrictions that may best facilitate the formulation of a well-considered Singaporean approach.

Third, while stating that cases from other Commonwealth jurisdictions "make interesting reading," they were rejected as persuasive as they turned on their own facts, bearing in mind the particular "social, political, industrial and other economic conditions" extant in their societies.[218] He could not rationalize the conflicting views of the judges in these cases and concluded they were at best "illustrations" of different approaches towards contempt law. No in-depth analysis of these cases, judicial reasoning, and balancing of values was afforded. Judge Sinnathuray was content to emphasize the need not to "lose sight of local conditions."[219]

While there is nothing objectionable in developing an autochthonous legal system, it is inadequate merely to invoke "local conditions" to justify departure from particular adjudicatory balancing models. Cogent reasons are sadly lacking in the Malaysian and Singaporean contempt cases. In *Wain*, the judge ignored the most local of local conditions: the fact that free speech in Singapore is a fundamental right warranting enhanced value, such that inconsistent law (statute or common law) is unconstitutional. Furthermore, any mode of balancing that effectively overwhelms individual free speech rights makes a mockery of constitutional liberties. The only local condition Judge Sinnathuray identified was the abolition of jury trials in Singapore:

---

[215] *Wain*, 2 MALAY. L.J. at 531 (citing Sunday Times v. U.K., 2 Eur. H.R. Rep. 245 (1979)).
[216] So noted by Lord Chancellor Hailsham in *Badry v. Director of Public Prosecutions of Mauritius*, [1983] 2 A.C. 297, 303 (U.K.). *See also* Badry v. Dir. of Pub. Prosecutions of Mauritius, (1982) 3 All E.R. 973, 978 (Eng.), *discussed in Wain*, 2 MALAY. L.J. at 531.
[217] *Wain*, 2 MALAY. L.J. at 531.
[218] *Id.*
[219] McLeod v. St Aubyn, [1989] A.C. 549 (U.K.).

> To my mind, the conditions local to Singapore are many and varied. I am not going to touch on the socio-political and economic conditions of our island nation which is markedly different from many other countries. For the present purpose, what I want to stress is that in so far as the judiciary is concerned, unlike in the United Kingdom and the United States, and a number of other Commonwealth countries where there are jury trials, and the jury are the judges of facts, the administration of justice in Singapore is wholly in the hands of judges and other judicial officers. So, this condition must weigh heavily in the application of the law of contempt in Singapore.[220]

This is a weak argument as it seems to boil down to the assertion that since judges in Singapore carry more responsibility as triers of both law and fact, they need more protection from critical speech lest public confidence in the administration of justice be imperiled. One might argue the converse is true and that wielding more power, fallible judges need greater accountability. In further diminishing protection for free speech, Judge Sinnathuray rejected the need to demonstrate in contempt proceedings a "real risk" of prejudicing the administration of justice or a "real and present danger," the tests adopted in U.K. and U.S. jurisdictions.[221] He preferred the much weaker test of requiring that the words had an "inherent tendency to interfere with the administration of justice," to be proved beyond a reasonable doubt.[222]

Judge Sinnathuray in *Wain* rejected the argument that the common law offense of scandalizing the court was inconsistent with the Article 14 free speech guarantee, noting that this position was adopted by Canadian courts and the U.S. Supreme Court. He specifically rejected *Kopyto*, observing that the ancient offense had co-existed with free speech guarantees in England for centuries.[223] To him, the "short answer" to the argument was that Article 14(2) authorized Parliament to limit speech, which it had done by legislating for the offense of contempt in SCJA.[224] This contemplates a minimalist role for constitutional review.

Counsel argued that Article 162 required this common law offense to be "read down" to ensure conformity with Article 14, i.e.,

---

[220] *Wain*, 2 MALAY. L.J. at 531.
[221] *Id.* at 534.
[222] *Id.* at 533.
[223] *Id.* at 531.
[224] *Id.* at 534.

reading Section 8(1) of SCJA as subservient to Article 14(1).[225] This Judge Sinnathuray rejected outright, stating that Article 162 was a saving clause, preserving the operation of "all existing laws" after the Constitution's commencement. Since SCJA was enacted in 1969 after commencement, Article 162 did not apply to it. In addition, no argument had been advanced that the Constitution had abolished the common law offense. Thus, the appropriate balance between free speech and judicial reputation was that struck by Parliament in SCJA, and according to Judge Sinnathuray, the Court had no business re-evaluating this. This stands in stark contrast with approaches in other jurisdictions that revise the common law to take into account the elevation of free speech from a residual common law guarantee to a constitutional one.

The only recourse for looking beyond the four walls was to cite pre-1981 English cases that did not manifest as robust a commitment to the value of free speech. A rights-based approach was to be eschewed in Sinnathuray's estimation. *Wain* was applied in *Attorney General v. Lingle*,[226] where Judge Goh recognized in principle that fair criticism of courts was protected by Article 14(1), but that this was not absolute and the speaker bore a corresponding duty of responsibility, which meant excluding "irresponsible accusations" against the judiciary.[227] Intent was not a component for finding contempt, though it was relevant for calculating damages, contrary to the Canadian approach that requires the speaker must manifest a degree of malice and that the effect of his speech must create a "real serious or substantial" danger to judicial reputation.[228] The Canadian approach is more protective of free speech and, indeed, displays both judicial confidence in being able to withstand hardy criticism and faith in the public's ability to discern truth from falsehood. To deny the applicability of this reasoning would be to suggest that the Singaporean public was undiscerning and that judicial reputation rests on tenuous foundations!

6. Political Libel and Politicians: Same Protection, Superior Compensation

This same supremacy accorded to public reputation is also endemic in defamation cases concerning the reputation of public officials. The extremely high damages that government politicians have been

[225] *Wain*, 2 MALAY. L.J. at 534.
[226] *See* Att'y Gen. v. Lingle, 1 SING. L. REP. 696 (High Ct. 1995).
[227] *Id.* at 701.
[228] R. v. Kopyto, [1987] 47 D.L.R. (4th) 213 (Can.).

awarded in suits against their critics has the harmful effect of chilling free speech.

a. No Public Figure Exception

The Singaporean courts have rejected the idea of a public figure exception recognized in both U.S.[229] and European Court of Human Rights[230] jurisprudence. Such jurisprudences postulates that a public figure should be thicker-skinned and subject to wider limits of acceptable criticism than private individuals in order to serve the democratic rationale of promoting free, robust debate about politicians and their policies. The Singaporean Court of Appeal in the leading case of *JB Jeyaretnam v. Lee Kuan Yew*[231] rejected the U.S. Supreme Court test in *Sullivan*, which maximizes protection to the speaker by requiring the plaintiff to show the speaker had actual malice. The court considered conclusive the fact that Article 14(1) referred to defamation as a restriction on free speech and did not presume to evaluate whether the appropriate balance between free speech and reputations of public officials were met.[232]

b. Preference for Pre-Constitutional Cases

The court in *JB Jeyaretnam v. Lee Kuan Yew* justified its position on the basis that under Singaporean law, politicians or public office holders were to enjoy the same protective regime as private persons. Rejecting pro-rights European and U.S. cases, the Court of Appeal contented itself with citing two pre-Charter Canadian cases, *Campbell v. Spottiswoode*[233] and *Tucker v. Douglas*,[234] both of which recognized that

---

[229] *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964). *Sullivan* was dismissed as being of no utility on the grounds that the U.S. First Amendment was couched in absolute terms, but this superficial statement neglects the fact that there are judicial limits to free speech in the U.S. Mere differences in textual formulations should not be determinative.

[230] *See* Lingens v. Aus., 8 Eur. Ct. H.R. sec. 407 (1986) ("The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual" because the politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed...and he must consequently display a greater degree of tolerance.").

[231] *See* JB Jeyaretnam v. Lee Kuan Yew, 2 SING. L. REP. 310 (C.A. 1992).

[232] *Id.* at 352 (finding that Article 14 was subject to the common law on defamation as modified by Statute 331, whereas it had been argued that pre-existing laws including the Defamation Act may require "reformulation" to take account of the recognition in the Constitution of the right of freedom of speech and expression).

[233] *See* Campbell v. Spottiswoode, (1863) 32 L.J.Q.B. 185 (appeal taken from Can.) (Eng.) (Cockburn, C.J.) ("But, it seems to me that the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and the best interests of our country; and I think that we ought not to sanction attacks

the law of defamation protected the reputations of public men to serve the public interest. The Singaporean Court of Appeal quoted from a treatise on libel and slander in commenting on *Sullivan*, where it was asserted that extending qualified privilege would do more public harm than good in deterring "sensitive and honourable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for their reputation."[235] This passage was approved by the Canadian Supreme Court in another pre-Charter case.[236]

Pre-Charter Canadian cases were readily invoked to justify a judicial approach that favored political reputation over free speech, disregarding the public harm caused by chilling robust public debate through inducing undue self-censorship. It might be said that this judicial stance accords with the government's preferred ideological view expressed in its shared values white paper:

> The concept of good government by honourable men (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population fits us better than the Western idea that a government should be given as limited powers as possible and should always be treated with suspicion unless proven otherwise.[237]

The danger with this approach is it would accord to unduly protect corrupt governors. The communitarian interest in the maintenance of public character has to be balanced against both the communitarian and individual interest in speech critical of public officials, a facet of modern democracy.[238] The court cited foreign cases to justify the maintenance in Singapore of the traditional common law approach that does not distinguish between public officials and private persons in defamation cases. However, in terms of damages quantum, it appears defamed public officials are accorded privileged treatment through awards of larger damages to reflect their important public status.

---

upon public men, which if allowed would be destructive of their character and honour, unless such attacks are well founded.").

[234] *See* Tucker v. Douglas, [1950] 2 D.L.R. 827 (Can.).

[235] *JB Jeyaretnam*, 2 SING. L. REP. at 333 (quoting PHILIP LEWIS, GATLEY ON LIBEL AND SLANDER 206 (8th ed. 1981)).

[236] *See* Globe & Mail v. Boland, [1961] 29 D.L.R. (2d) 401 (Can.).

[237] SINGAPORE, *White Paper on Shared Values*, Cmd. 1 of 1991 (presented Jan. 2, 1991 to Parliament by Command of the President of the Republic of Singapore, ordered by Parliament to lie upon the table).

[238] *See* ERIC BARENDT, FREEDOM OF SPEECH 146-52 (1985) (discussing the importance of political speech within democracies).

The Court of Appeal's approach was affirmed in *Goh Chok Tong v. Jeyaretnam JB*:

> The Prime Minister is entitled to his reputation no less than the ordinary citizen and it is not required for the Prime Minister to prove malice on the part of the defendant to succeed in this claim. Whilst there is an undeniable public interest in protecting freedom of speech as a means of exposing wrongdoing or abuse of office by public officials, there is an equal public interest in allowing those officials to execute their duties unfettered by false aspersions.[239]

However, Judge Rajendran showed some discomfit as to whether the law on defamation warranted revisiting in light of an English House of Lords case, *Derbyshire County Council v. Times Newspapers.*[240] Although this reflected the rights-based approach of the European Convention on Human Rights, Lord Keith in *Derbyshire* stressed that the decision was reached at common law. Following past Singaporean cases, this would make *Derbyshire* a persuasive authority, for the proposition that it was of "highest public importance that a government body should be open to uninhibited public criticism" and that this should possibly extend to public officers.[241] Judge Rajendran, in deferring to precedent, noted, "Although this raises the question whether Singaporean law (being premised on English common law) should follow suit, that is a question for the Court of Appeal."[242] However, the Court of Appeal refused to be persuaded on this point or to re-evaluate the Singaporean law on libel. Indeed, it revised upward the comparatively modest award Judge Rajendran granted, which included consideration of the plaintiff's "reputation and standing," from SG$20,000 to SG$100,000.[243] The trend towards high damages does not seem to be abating; in *Tang Liang Hong v. Lee Kwan Yew*,[244] where an opposition politician was sued by thirteen members from the ruling People's Action Party ("PAP"), the court awarded damages totaling SG$5.8million. Judge of Appeal Thean declared for the Court of Appeal:

---

[239] Goh Chok Tong v. Jeyaretnam JB, 1 SING. L. REP. 547, 561 (High Ct. 1998).
[240] *See* Derbyshire County Council v. Times Newspapers, (1993) 1 All E.R. 1011 (Eng.).
[241] *Goh Chok Tong*, 1 SING. L. REP. at 561-62 (quoting *Derbyshire*, 1 All E.R. 1011).
[242] *Id.* at 562.
[243] *See* Goh Chok Tong v. Jeyaretnam JB, 3 SING. L. REP. 337 (1998).
[244] Tang Liang Hong v. Lee Kwan Yew, 1 SING. L. REP. 97 (1998).

> Any argument which calls for a reduction or moderation of damages purely on the basis that the successful plaintiff is a politician, say a minister, or that the case has a political flavour is untenable and wrong. To accept such a contention is to allow a person more latitude to make defamatory remarks of such personality and to escape with lesser consequences for the defamation he committed. Such a result, if permitted, would be in violation of [Article] 12(1) of our Constitution which states: All persons are equal before the law and entitled to the equal protection of the law." No one is free to defame with impunity another person, irrespective of whether such person is a politician or ordinary citizen. Freedom of expression comes with responsibility, and a breach of such responsibility would be visited with consequences (sometimes serious consequences).[245]

This shows no regard for the public harm caused by chilling free speech. By awarding politicians high damages quantum in excess of that awarded for personal injuries, it would appear government leaders, when allegedly defamed, enjoy the same protection of their reputations as private individuals but are privileged through receiving higher damages than that accorded a private person, flowing from their public standing. This is quite contrary to equal treatment under the law.

Certainly, in the computation of damages for libel made by an opposition politician against the former Prime Minister in *Goh Chok Tong v. Chee Soon Juan (No. 2)*[246] the SG$300,000 damages award considered the standing of the parties. Judge Kan noted that the defamation was serious "because it constituted a severe indictment against a senior member of the government for the disposal of a large sum of the nation's funds." Both Chee and Goh were "prominent public figures" who had the capacity to damage the reputations of those of whom they spoke ill, undermining their effectiveness as public officials and standing by damaging public perception of their integrity.

---

[245] *Id.* at 139.

[246] Goh Chok Tong v. Chee Soon Juan (No. 2), 1 SING. L. REP. 573, 581 (2005).

C. *Demonstrating a Lack of International Consensus on the Content of a Right and Maintaining Deference to Parliament*

The force of using transnational sources in rights adjudication is that of demonstrating a universalizing trend to show that a particular line of decisions reflects an emergent or existing international consensus. Singaporean and Malaysian courts have sought to demonstrate that consensus is fragmented in order to deprive these decisions or standards of much of their weight. To shore up decisions emphasizing the importance of preserving public order, foreign decisions are cited to indicate a limited solidarity of a given approach with other jurisdictions and to enhance the domestic legitimacy of a decision by demonstrating it is not entirely out of step with the international community. The demonstration of a lack of consensus is shown in various ways.

1. Strategic Usage to Enhance Domestic Legitimacy

References to foreign case law have been used as strategic tools to justify politically contentious or unpopular decisions, which usually advance public order arguments and to enhance the domestic legitimacy of such cases.

The Federal Court in the Internal Security Act[247] ("ISA") detention case of *Ketua Polis Negara v. Abdul Ghani Haroon* stressed that the habeas corpus clause in Article 5(2) of the Malaysian Constitution had to be applied "according to the wording of our Constitution as a whole and to find its meaning by legal reasoning."[248] The trial judge had come to an erroneous conclusion in ruling a detainee had a constitutional right to be present in Court for his habeas corpus application, by paying "scant regard" to the wording of Article 5(2) and not reading this Article "in the context of the relevant law applicable to a detainee." This case fell under Section 73 of the ISA, enacted pursuant to Article 149 and designed to protect national security. The constitution, through a notwithstanding clause, provided that ISA would be valid even where it breached fundamental liberties contained in Articles 5, 9 or 10 of the Malaysian Constitution. Thus, ISA reduced the scope of the constitutional right to be present in court for habeas corpus proceedings.[249]

---

[247] *See* Internal Security Act, 1960, ACT NO. 82 (Malay.).
[248] Ketua Polis Negara v. Abdul Ghani Haroon, 4 MALAY. L.J. 11 (Kuala Lumpur, Fed. Ct. 2001).
[249] *Id.* at 17.

To support this position, Chief Justice Shim noted that for ministerial detentions authorized by Section 8 of the ISA, a detained person's right to be present at the habeas corpus proceedings was not a constitutional right; rather, it was up to judicial discretion. This was consonant with the Supreme Court case of *Menteri Hal Ehwal Dalam Negeri, Malaysia v. Lim Guan Eng*, which held "it is not the practice to allow the presence of the person detained" and thus, "we could not possibly disagree with what was said by the Supreme Court."[250] Despite declaring it was bound by precedent and calling for a focus on the constitutional and statutory textual matrix, the Federal Court sought to fortify its reasoning by citing as "persuasive authority" Judge Bhagwati in *Kanu Sanyal v. District Magistrate, Darjeeling*[251] (a habeas corpus proceeding addressing the need of the detainee to be produced at the hearing itself), where he said that inquiring into the legality of an allegedly wrongful detention could be made without requiring the detainee to be produced before court as this would merely be a blind adherence to form. Appreciating the antagonistic public sensitivities towards exercises of ISA powers, the Court felt the need to reiterate Federal Judge Raja Azlan Shah's observation in *Loh Kooi Choon v. Government of Malaysia* that the harshness or injustice of an Act was a question of policy falling within the province of Parliament, and those vexed with this interference with fundamental rights should locate "their remedy at the ballot box," minimizing the judicial role (and culpability) as "guardian of justice."[252]

2. A House Divided: Membership in Divided Camps

Singaporean courts have actively discussed foreign decisions relating to such matters as the death penalty and the "death row phenomenon," which has been the subject of much litigation in both national and human rights courts. In using comparative law, the courts have basically demonstrated their solidarity with certain approaches, while discounting other cases on technical grounds like non-comparable provisions. In some cases, they have borrowed from foreign judicial reasoning, while maintaining a posture of deference to Parliament. Notably, Singapore and the U.S. seem to share solidarity of values in the assumptions underlying the handling of cases relating to the death row phenomenon and in challenging the death penalty as cruel, inhuman treatment.

---

[250] Menteri Hal Ehwal Dalam Negeri, Malay. v. Lim Guan Eng, 1 MALAY. L.J. 420 (1989).
[251] *See* Kanu Sanyal v. Dist. Mag., Darjeeling, A.I.R. 1973 S.C. 2684, 2698 (India).
[252] Loh Kooi Choon v. Gov't of Malay., 2 MALAY. L.J. 187, 188 (1977).

a. Death Row Phenomenon

With respect to the death row phenomenon, a person convicted of murder and sentenced to death in *Jabar v. Public Prosecutor*[253] argued that the passage of more than five years since the imposition of the death sentence made execution unconstitutional, as it would be a deprivation of life not "in accordance with law" as required by Article 9(1). This argument involved reading the prohibition against cruel and inhuman punishment into the word "law" as a facet of the standards of fairness "law" embodied. The Privy Council decision of *Pratt v. Attorney General for Jamaica*[254] was relied upon for this proposition. The Court of Appeal extensively engaged with Privy Council and Indian case law before rejecting these and instead approving various U.S. decisions. This again shows the use of foreign decisions to show a lack of consensus or universality of approach to the same constitutional problem and to diminish the persuasive impact of any one case by showing its dissenting counterpart from another jurisdiction.

Pratt was not considered applicable "as there was no equivalent of [Section] 17(1) of the Jamaican Constitution" prohibiting "inhuman or degrading treatment" in the Constitution of Singapore. It of course was open to the court to read this substantive standard into Article 9 and Article 12 (equality clause), building on *Ong Ah Chuan*. The Privy Council in *Pratt* endorsed the minority dissents of Lords Scarman and Brightman in its earlier decision of *Riley v. Attorney General of Jamaica*,[255] where it found that Article 17(2) of the Constitution authorized death by hanging, irrespective of how long the delay was between the passing of sentence and its execution. Lord Griffiths in *Pratt* spoke of an "instinctive revulsion" which stemmed from "our humanity" at the prospect of executing a man after an inordinate delay, provided the delay was not self-inflicted through wasteful resort to legal procedures constituting an abuse of process.[256] He stated, "Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence."[257] The Singaporean court was not persuaded by appeals

[253] Jabar v. Pub. Prosecutor, 1 SING. L. REP. 617 (C.A. 1995). *See also* Li-ann Thio, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam*, SING. J.L. STUD. 240 (1997).

[254] *See* Pratt v. Att'y Gen. for Jam., (1994) 4 All E.R. 769 (P.C.) (appeal taken from Jam.) (Eng.). In *Pratt*, the appellants had been on death row for fourteen years; consequently, it was ordered that their sentences be commuted to life imprisonment, with the rule of thumb that a delay of more than five years will render execution inhuman and degrading punishment.

[255] *See* Riley v. Att'y Gen. of Jam., [1983] 1 A.C. 719 (appeal taken from Jam.) (U.K.).

[256] *Pratt*, 4 All E.R. at 783.

[257] *Id.* at 786.

to evolving standards of humanity that the remedy of commuting a death sentence to life imprisonment was warranted.

Indian case law was also dismissed because the Indian equivalent, Article 21 of Indian Constitution, requires that deprivation of life must be "according to procedure established by law." The Indian cases had indicated that such procedure must be just, fair and reasonable and suggested that a wait of more than two years would allow death row prisoners to demand their sentence be quashed. *Vatheeswaran v. State of Tamil Nadu*[258] is exemplar of this approach, though the Supreme Court in *Sher Singh v. State of Punjab*[259] advocated an enquiry into the nature of the delay. Chief Justice Chandrachud held the "jurisprudence of the civilized world has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading."[260] Thus, Article 21, whose horizons are "ever widening," allowed a prisoner to ask the court whether it was fair and just to impose a death sentence after years of waiting. The Indian court declared, "Article 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fair play. That voice...reverberates through all stages—the trial, the sentence, the incarceration and finally, the execution of the sentence."[261]

Citing two Malaysian cases, the Singaporean Court of Appeal rejected the Indian authorities as irrelevant given that Article 21 refers to "procedure" while Article 9 referred to "law," constituting a "material difference" between Indian and Singaporean criminal procedure. While there was some discretion in imposing a death penalty in the former, it was mandatory in Singapore for capital cases. The court agreed with the statement in *Karam Singh*:

> Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of minister responsible to and accountable in Parliament, not to mere officials. Secondly, as already stated, here detention, in order to be lawful, must be in accordance with the law, not as in India where it must be in accordance with *procedure* established by law.[262]

---

[258] *See* Vatheeswaran v. State of Tamil Nadu, (1983) 2 S.C.R. 348 (India).
[259] *See* Sher Singh v. State of Punjab, (1983) 2 S.C.R. 582 (India).
[260] *Id.* at 591, *quoted in* Jabar v. Pub. Prosecutor, 1 SING. L. REP. 617 at 628 (C.A. 1995).
[261] *Sher Singh*, 2 S.C.R. at 593, *quoted in Jabar*, 1 SING. L. REP. at 628.
[262] Karam Singh v. Menteri Hal Ehwal Dalam Negeri, 2 MALAY. L.J. 129 (1969). *But see* Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan, 1 MALAY. L.J. 261, 285 (C.A. 1996) (stating that the views in *Karam Singh* were articulated at a time "when learning upon the interpretation of

This argument can be rebutted by the fact that the word "law" can easily be construed to include "procedure" within its ambit. Mere textual differences cannot be determinative; normative reasoning must come into play, and this can be achieved through a purposive approach to give effect to the spirit of a right. As Court of Appeal Judge Ram noted in the Malaysian case of *Tan Tek Seng*: the essential question was not the differences between "law" and "procedure" *per se*; but whether the "the difference in language between the two articles create any distinction in principle."[263] He concluded that it did not and that "law" in Articles 5(1) and 8(1) of the Malaysian Constitution included procedural law, such that unfair and arbitrary procedures would be struck down as offending Article 5(1) read with Article 8(1).

The Singaporean Court of Appeal, at the height of its devotion to positivism or literalism in interpretation, declared:

> We respectfully agree that [Article] 9(1) is different from [Article] 21 in India. 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.[264]

In so stating, the court displayed deference to Parliament and discounted for itself a robust role as legal guardian of liberties. Its stance comports more with the view that the ultimate check on bad legislation lies with Parliament and the people's ability to hold their representatives accountable at elections, *i.e.* de facto parliamentary supremacy. Underlying this approach is the view that concerns about fundamental liberties should be addressed to elected parliamentary representatives. A minimalist approach towards constitutional review, to uphold parliamentary intention, appears to be advocated. Fortunately, a later court acknowledged that this was an undue restriction of judicial review and recognized there was "room for debate" in interpreting Article 9,[265] whereby "law" referred to "fundamental rules of natural justice," rather

---

written constitutions was still at its infancy," and drawing attention to the contemporaneous Australian case of *Re Cent. Provinces & Berar Sales of Motor Spirfkait & Lubricants Taxation Act*, A.I.R. 1939 F.C. 1, which stated the constitution should be construed as an organic thing, with a liberal approach). *See also* Re Tan Boon Liat v. Anor, 2 MALAY. L.J. 108, 114 (1977) (Lee, Hun Hoe, concurring) (stating that Judge Suffian in *Karam Singh* "did not say procedure was not part of the law" and therefore Article 5 was "wide enough to cover procedure as well").

[263] *Tan Tak Seng*, 1 MALAY. L.J. at 286.

[264] *Jabar*, 1 SING. L. REP. at 631.

[265] *See* Nguyen Tuong Van v. Pub. Prosecutor, 2 SING. L. REP. 328, 353 (High Ct. 2004).

than "just Parliament-sanctioned legislation," thus affirming *Ong Ah Chuan*.[266] The court was concerned both with procedural compliance in relation to the passage of legislation as well as ensuring the act was valid and did not "contravene the Constitution," that is, the substantive values or principles contained therein.[267]

While expressing some sympathy for the mental agony prisoners suffered while awaiting execution, the Court of Appeal considered this an "inevitable consequence" not amounting to a breach of constitutional rights.[268] Ultimately, the decision was based on the scope of judicial power, with the Singaporean Court of Appeal stating that unlike Indian courts, its role terminated after the imposition of a sentence. Any appeals for clemency fell within the province of the executive.[269] Despite this, the Court of Appeal, having examined the foreign case law at length, felt it should offer its views, which are obiter, on the view in *Pratt* that prolonged delay in executing death sentences constituted inhuman punishment. Refusing to admit that evolving standards of decency informing what constitutes inhuman punishment should be treated as legal standards, the court declared its preference for the views expressed by in the U.S. Court of Appeals Ninth Circuit case, *Richmond v. Lewis*,[270] where it was held that a prisoner on death row should not be allowed to benefit from his unsuccessful pursuit of appeals, as this would put him in a better position than one who had not appealed. This dispels the persuasive quality of the Privy Council cases in demonstrating the lack of universal consensus on how to characterize death row phenomena cases.

b. The Death Penalty as Inhuman Punishment?

Judge Lai for the Court of Appeal in *Nguyen Tuong Van v. Public Prosecutor*[271] demonstrated the predictable deference towards Parliament in rejecting the argument that death by hanging was contrary to a norm established either as an unenumerated right associated with Article 9 or automatically applied customary human rights norm, prohibiting inhuman

---

[266] *See* Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. 103, 124 (C.A. 2005).
[267] *See Nguyen*, 2 SING. L. REP. at 328 (High Ct.).
[268] *See Jabar*, 1 SING. L. REP. at 630D.
[269] *Id.* at 632 ("It is solely the prerogative of the President, to decide whether a delay in execution amounts to sufficient ground to justify a commutation of sentence. It is clearly not part of the court's functions. It was on this ground alone that we dismissed the appeal").
[270] *See* Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990).
[271] *See* Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. at 103 (C.A.).

and degrading treatment.[272] He distinguished the applicability of the Privy Council decision of *Reyes v. Queen*[273] on the technical ground that the Singaporean Constitution bore no comparable provision to the Constitution of Belize, which prohibited torture, inhuman, and degrading treatment.[274] The High Court had noted that *Reyes* would have been relevant had there been an equivalent provision in the Singaporean Constitution.[275] This finding showed discomfit towards developing unenumerated rights jurisprudence by reading standards of humanity into the notion of "law." Such an approach would comport with that adopted by the Privy Council in *Reyes*—in evaluating whether a punishment falls short of the prohibition against cruel and inhumane treatment, "evolving standards of decency that mark the progress of a maturing society" must be considered.[276]

The Court of Appeal noted that the Privy Council in *Reyes*, in interpreting what fundamental standards of humanity required, was heavily influenced by international human rights law and the jurisprudence of foreign courts.[277] It noted that essential components of the prohibition against cruel and inhuman treatment were proportionality and individualized sentencing.[278] Thus, what was required, to maintain respect for humanity, was a consideration of the circumstances of the accused, his character, and his record before imposing the ultimate sanction.

The Privy Council in the 2004 case of *Watson v. Queen* showed its greater receptivity to international human rights norms through skepticism concerning the authority of *Ong Ah Chuan* and its assumption that there was "nothing unusual in a death sentence being mandatory."[279] The Council considered that *Ong* was made "at a time when international jurisprudence on human rights was rudimentary," echoing Lord

---

[272] *See* Michael Hor, *The Death Penalty in Singapore and International Law*, 8 SING. Y.B. INT'L L. 105-17 (2004).

[273] *See* Reyes v. Queen, [2002] 2 A.C. 235 (U.K.).

[274] The High Court distinguished the *Reyes* case where the mandatory death penalty for murder by shooting was held unconstitutional since this denied the offender "the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate, is to treat him as no human being should be treated and thus to deny his basic humanity," which Section 7 of the Belize Constitution protects. *See* Reyes v. Queen, [2002] 2 A.C. 235 (U.K.).

[275] *See* Nguyen Tuong Van v. Pub. Prosecutor, 2 SING. L. REP. 328 (High Ct. 2004).

[276] *Id.* at 351-52.

[277] The Privy Council in *Reyes* considered standards derived from the Universal Declaration on Human Rights, European Convention on Human Rights, International Covenant on Civil and Political Rights, American Declaration of the Rights and Duties of Man, and American Convention on Human Rights. *See Reyes*, 2 A.C. at 238.

[278] *See* Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. 103 (C.A. 2005).

[279] Watson v. Queen, [2004] UKPC 34, ¶ 29, 30 (appeal taken from Eng.) (U.K.).

Bingham's observations in *Reyes* that the death penalty for murder "long predated any international arrangements" for human rights protection.[280]

The Court of Appeal refused to be persuaded by the force of human rights development and latched onto the fact that the Privy Council in *Reyes v. Queen* did not consider mandatory death sentences "absolutely unconstitutional."[281] Nevertheless, it appeared to evaluate the operation of the Misuse of Drugs Act[282] ("MDA") against Article 9 and must have applied some substantive standard of humanity to conclude that the MDA death sentence was "sufficiently discriminating to obviate any inhumanity in its operation."[283]

c. Equality and the Death Penalty: References to Foreign Cases to Aid in Application of Approaches while Maintaining de facto Parliamentary Supremacy

Singaporean courts have referred to foreign cases to aid the adjudicatory process while maintaining an essential deference towards Parliament in the final result. For example, in equality jurisprudence, a presumption of constitutionality applies.[284] For equality to be violated, it must be demonstrated that the legislative classification does not meet the test of a rational nexus between the classification and a legitimate objective.[285] This nexus is construed broadly by the courts in deference to Parliament.

For example, in *Nguyen Tuong Van v. Public Prosecutor*,[286] an Australian national of Vietnamese origin was found guilty and convicted of drug trafficking offenses, which warranted a mandatory death sentence under MDA. He argued that his Article 12 right to equal protection of the law was violated, basing this on the Indian Supreme Court decision of *Mithu v. State of Punjab*.[287] There, the Indian court struck down Section 303 of the Penal Code, which provided that life convicts who committed murder automatically merited a mandatory death sentence, as there was

---

[280] *Id., discussed in Nguyen*, 1 SING. L. REP. at 103 (C.A.).
[281] *Id.*
[282] Misuse of Drugs Act, 1971, ch. 185, 2001 Rev. Ed. (Sing.).
[283] *Watson*, [2004] UKPC at ¶ 29, 30. This was a departure from the 1995 Court of Appeal's approach in *Jabar* where review was confined to ascertaining whether legislation was validly passed. *See* Jabar v. Pub. Prosecutor, 1 SING. L. REP. 617 (C.A. 1995).
[284] Taw Cheng Kong v. Pub. Prosecutor, 1 SING. L. REP. 943, 954 (1998).
[285] *Id.* At 965.
[286] *See* Nguyen Tuong Van v. Pub. Prosecutor, 2 SING. L. REP. 328 (High Ct. 2004).
[287] *See* Mithu v. State of Punjab, A.I.R. 1983 S.C. 473 (India).

no sociological data indicating that life convicts demonstrated a greater propensity for homicide than non-lifers. Borrowing from this, Nguyen argued that the law was arbitrary for imposing a death sentence of those guilty of trafficking more than fifteen grams of heroin but a different sentence on a trafficker carrying 14.99 grams. Further, it was argued that the mandatory death sentence removed from the individual the protection of the criminal justice system by taking away "the protection of a judicial sentence," violating Article 12 equal protection rights.[288] Under MDA, the court thus could not differentiate between the moral blameworthiness of offenders. Further, defense counsel argued that in criminal justice systems deriving from English law, justice connoted "fairness and equity" and was "usually required to conform to developing community standards."[289] Rather than being a comparative for the punishment imposed on an offender, equal protection was better characterized as "an entitlement to be protected from injustice in the form of a disproportionate sentence."[290] This argument invited the court to consider, on its own merits, whether a particular sentence imposed on an individual was disproportionate and to discount the fact that everyone falling within this category suffered the same sentence.

The Court adhered to the precedent in *Ong Ah Chuan v. Public Prosecutor*, where Lord Diplock noted that Article 12 was concerned not with "equal moral blameworthiness" but "similar legal guilt"; it only required that like be treated alike, not prohibiting discrimination between classes.[291] The legislature could properly exercise its powers to impose a mandatory death sentence so long as the differentiating factors employed for the death sentence were not arbitrary and were reasonably related to the act. In such cases, punishment was imposed without hearing mitigation pleas, and the Equal Protection Clause was not violated.[292] The Privy Council accepted in *Ong Ah Chuan* that the issue of mandatory death sentences related to social policy falling within the legislative province,[293] as did the legal differentiation of criminal punishment for different crimes.[294]

---

[288] *Nguyen*, 2 SING. L. REP. at 351-52 (High Ct.).
[289] *Id.*
[290] *Id.* at 351.
[291] Ong Ah Chuan v. Pub. Prosecutor, 1 SING. L. REP. 48, 65 (1980-81).
[292] *Id.*
[293] Their Lordships would emphasize that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to such an evil and profitable a crime as trafficking in addictive drugs. Whether there should be capital punishment in Singapore and, if so, for what offenses are questions for the legislature of Singapore. *See Ong*, 1 SING. L. REP. at 63.
[294] *Id.* at 64.

The appellant challenged the legislative judgment behind the quantitative fifteen-gram differentiation for drug trafficking offenses and the imposition of the death penalty for cases where a certain quantity of addictive drugs was involved, charging that the relevant aspect of *Ong Ah Chuan* was decided wrongly in the light of recent Privy Council cases.[295]

The Court of Appeal in *Nguyen* accepted that it was wrong to decide the issue of the constitutionality of a differentiating trait on "a blind acceptance of the legislative fiat" and it was the judicial duty to ascertain "the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation."[296] Following *Ong Ah Chuan*, the court would entertain "plausible reasons" that a particular differentiation was "purely arbitrary." This test is generally deferential to legislative determination but does not treat it as definitive. In this respect, the court found helpful the contextual approach of the Hong Kong Court of Final Appeal in Lau Cheong v. HKSAR,[297] which dealt with whether a mandatory life sentence for murder infringed upon constitutional guarantees against arbitrary punishment and unequal treatment.[298] It singled out various factors that rendered it judicially appropriate for the Hong Kong court to "give particular weight to the views and policies adopted by the legislature,"[299] whose conclusions had an objective basis in being founded on an examination of the legislative history, legislative debates, and construction of the relevant statutory regime, rather than any subjective judicial ideological preferences. First, it noted that the issue of calibrating an appropriate punishment for the most serious crime "is a controversial matter of policy involving different views on the moral and social issues involved."[300] The Hong Kong court noted that the 1993 amendment that promulgated mandatory life sentences in place of the abolished mandatory death penalty was the product of a legislative compromise. Second, the legislature had enacted a comprehensive statutory regime in conjunction with the mandatory life sentence, providing for individualized review.[301]

Justifying its decision by reference to these cases, the Singaporean court found that there was an absence of "comparable material," as was provided in *Mithu*, speaking to whether the legislative classification in

---

[295] *See* Watson v. Queen, [2004] UKPC 34 (appeal taken from Eng.) (U.K.); Boyce v. Queen [2004] UKPC 32 (appeal taken from Eng.) (U.K.); Matthew v. State, [2004] UKPC 33 (appeal taken from Eng.) (U.K.); Reyes v. Queen, [2002] 2 A.C. 235 (U.K.).

[296] Nguyen Tuong Van v. Pub. Prosecutor, 1 SING. L. REP. 103 (C.A. 2005).

[297] *See* Lau Cheong v. HKSAR, [2002] 2 H.K.L.R.D. 612.

[298] *See Nguyen*, 1 SING. L. REP. at 103 (C.A.).

[299] *Lau Cheong*, 2 H.K.L.R.D. at ¶ 102, *quoted in Nguyen*, 1 SING. L. REP. at 124 (C.A.).

[300] *Id.* at ¶ 105, *quoted in Nguyen*, 1 SING. L. REP. at 124 (C.A.).

[301] *Id.*

MDA was insupportable; in the absence of "full arguments," the fifteen-gram differentiation was upheld.[302] Nevertheless, the court would consider sociological data, full arguments, and evidence challenging the rational basis for a legislative classification, providing some minimal control over legislative power. It found on the facts that MDA was sufficiently discriminating to obviate any inhumanity in its operation, technically affirming moral (if not legal) concerns that laws should not be inhuman, while deferring to legislative wisdom in the same breath through the application of a lax standard of review.

3. Speaking with the Past: Of Values, Temporal and Spiritual, and the Supremacy of Public Order in Times of War and Peace

In some cases like *Colin Chan v. Public Prosecutor*,[303] the Singaporean High Court has been both dismissive and receptive of foreign case law, depending on whether citing it serves to buttress its conclusions. In *Colin Chan*, the court affirmed the executive's decision that Jehovah's Witnesses posed a threat to national security because of their pacifist refusal to perform compulsory military service, warranting their deregistration under the Societies Act[304] and the banning of all publications from their publishing arm (regardless of content) under the Undesirable Publications Act.[305]

After demonstrating a parochial bent by declaring that the decision ought to be rendered by solely considering domestic law, Chief Justice Yong proceeded to approve of the reasoning of a wartime Australian case, *Adelaide Company of Jehovah's Witnesses v. Commonwealth of Australia*,[306] with respect to limitations on religious freedom of Jehovah's Witnesses.

In *Adelaide Company*, the Governor General, through the National Security (Subversive Associations) Regulations in January 1941 during Second World War, declared the Adelaide Company of Jehovah's Witnesses "prejudicial to the defence of the Commonwealth and the efficient prosecution of war."[307] Thereafter, their premises were seized, and the Jehovah's Witnesses challenged the constitutionality of the Regulations. The Court held that Parliament could pass laws prohibiting

---

[302] *Id.*

[303] *See* Colin Chan v. Pub. Prosecutor, 3 SING. L. REP. 662 (High Ct. 1994).

[304] Societies Act, 1972, ch. 311 (Sing.).

[305] Undesirable Publications Act, 1968, ch. 338 (Sing.).

[306] *See* Adelaide Co. of Jehovah's Witnesses v. Commw. of Austl., (1943) 67 C.L.R. 116 (Austl.).

[307] *Colin Chan*, 3 SING. L. REP. at 683 (quoting from the Australian National Security (Subversive Associations) Regulations).

the advocacy of doctrines, even religious ones, that would hamper the war effort. This fortified Chief Justice Yong's conclusion that freedom of religion must conform to the general law relating to public order and social protection and, furthermore, that if these "tend to" undermine such objectives, restraint was warranted. This pitches at too low a level the protection of a constitutional right as a "tendency" justifying restrictive state action is too easily found, compared to it being reasonably foreseeable that religious practices might imperil public order. Chief Justice Yong was impatient towards any such nuanced, surgical balancing approaches and advocated a blunderbuss "pre-emptive" approach:

> In my view, Mr. How's submission that it must be shown that there was a clear and immediate danger was misplaced for one simple reason. It cannot be said that beliefs, especially those propagated in the name of 'religion', should not be put to a stop until such a scenario exists. If not, it would in all probability be too late as the damage sought to be prevented would have transpired. In my opinion, any administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naive but also grossly incompetent.[308]

The court also seems to suggest that it is apt for a Singaporean court in peacetime to import and adopt the reasoning of a wartime case, manifesting a siege mentality. The reasoning from *Adelaide Company*, where security was prioritized over liberty, appears to have been considered by the Singaporean court as an appropriate import. This comports with the heightened desire of the Singaporean government to maintain public order, which is affirmed in the "order-based" jurisprudence of the Court.

4. Misrepresentation

In *Colin Chan v. Public Prosecutor*, the court cited the Indian case of *Commissioner, Human Rights Education v. LT Swamiar* for the proposition that "[t]he 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*

[308] *Id.* at 683.

of civil liberty would be a mockery'."[309] However, a critic has trenchantly pointed out that this is a misunderstanding of that case and was taken out of context since the quotation was actually a paraphrase by Justice Mukherhjea on the approach adopted by Chief Justice Latham in *Adelaide Company*. [310] Indeed, the outcome of *Swamiar* would have favored the Jehovah's Witnesses in *Colin Chan* because the legislative provisions that interfered with the administration of a religious institution were struck down as unconstitutional. This careless usage of an Indian authority offers only a distorted view of the law in a foreign jurisdiction and demonstrates that foreign cases, or selected phrases from decisions, are instrumentally used to bolster a predetermined legal finding, rather than as an aid to principled legal reasoning.

The random borrowing of stray phrases, taken out of context from a judgment, seems to show that certain judges treat foreign judgments as a quotation sourcebook. This was evident from the reference in *Nappalli Peter Williams v. Institute of Technical Education*[311] to Justice Jackson's statement in *West Virginia State Board of Education v. Barnette*[312] that "a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[313] Nappalli, a Jehovah's Witness teacher who had been dismissed for refusing to salute the flag and say the national pledge, argued that he was being compelled to take part in a religious ceremony by saluting the flag, contrary to his religious beliefs and Article 16(3).[314]

Chief Justice Yong considered that such a broad view of "religion" would create "complications," in terms of subjectivity, citing Justice Jackson's statement. Reiterating his own four walls doctrine in *Colin Chan*,[315] Chief Justice Yong rejected decisions from foreign jurisdictions like the Philippines[316] and the U.S., which espoused an expansive definition of "religion" under which anti-theistic belief systems like secular humanism would be deemed a religion.[317] According to

---

[309] *Id.* (quoting Commissioner, Hum. Rts. Educ. v. LT Swamiar, (1954) S.C.R. 1005 (India)) (emphasis added).

[310] The author owes this point to her colleague Arun Thiruvengadam, who discusses this argument in his chapter on Singapore in Instrumental Nationalist Constitutionalism (unpublished J.S.D. work in progress, N.Y.U. Law School, on file with author).

[311] *See* Nappalli Peter Williams v. Inst. of Technical Educ., 2 SING. L. REP. 569 (1999).

[312] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[313] *Williams*, 2 SING. L. REP. at 576.

[314] *Id.* at 569. Article 16(3) reads, "No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own." SING. CONST. pt. IV, art. 16(3).

[315] *Id.* at 574.

[316] *See* Ebralinag v. Div. Superintendent of Sch. of Cebu, G.R. No. 95770, 219 SCRA 256 (Mar. 1, 1993) (Phil.).

[317] *See* United States v. Seeger, 380 U.S. 163 (1965).

Chief Justice Yong, religion in the context of Article 15 was about a citizen's "[f]aith in a personal God" or "belief in a supernatural being," and the "State commands no supernatural existence in a citizen's personal belief system."[318] Chief Justice Yong stated he preferred the lower court decision of *Thomas v. Review Board of Indian Employment Security Division*,[319] which considered that a person who viewed saluting a flag as a form of worship did so pursuant to a "philosophical choice," a "distortion of secular fact into religious belief."[320] Thus, saluting a flag could not be considered a religious practice, although this is precisely what a Jehovah's Witness would consider an idolatrous act.

Two points are worth noting. First, the *Barnette* case is famous for overruling the prior position of the U.S. Supreme Court in *Minersville School District v. Gobitis*[321] where a decision to dismiss two Jehovah's Witness children from school for refusing to salute the flag was upheld. Justice Jackson in *Barnette* argued that it was not permissible where there was a constitutional right to religious freedom to use coercive methods to achieve national unity; the minimal harm caused by the refusal to salute a national symbol could not justify a limit on religious freedom. For Chief Justice Yong to cite an isolated sentence from Justice Jackson's judgment to suggest that that case supports his reasoning (when it supports the opposite conclusion) is disingenuous or, at best, misleading. Second, judicial selectivity of foreign cases is evident in the non-discussion of the U.S. Supreme Court's decision reversing the Supreme Court of Indiana decision, which decided the *Thomas* case. The U.S. Supreme Court found that, in addressing the issue of whether a person held a religious belief attracting constitutional protection, the issue was not to turn on a "judicial perception" of that belief, as "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit protection."[322]

D. Distinguishing Judicial Roles and the Utility of Decisions based on Regional Human Rights Standards

Foreign cases have been distinguished on the basis of dissimilar histories motivating the drafting of constitutional clauses[323] or differing

---

[318] *Williams*, 2 SING. L. REP. at 576.

[319] *See* Thomas v. Review Bd. of Indian Employment Sec. Div., 450 U.S. 707 (1981).

[320] *Williams*, 2 SING. L. REP. at 576.

[321] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

[322] *Thomas*, 450 U.S. at 713-14.

[323] In *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh*, 1 MALAY. L.J 697 (Kuala Lumpur, Sup. Ct. 1992), the Malaysian court rejected the applicability of Indian authorities in relation to associational rights in finding anti-hopping legislation violates Article 10 of the Malaysian

judicial roles as defined by statute and the specific standards these courts are bound to apply by way of incorporating a treaty.

In grappling with the utility of decisions, particularly from the U.K. and from states that are party to the European Convention on Human Rights and influenced by its jurisprudence, Malaysian courts have examined at length the distinct judicial role now played by U.K. courts as mandated under the terms of the Human Rights Act. U.K. courts have the power to declare legislation inconsistent with provisions from the European Convention on Human Rights.

In *Kok Wah Kuan v. Pengarah Penjara Kajang, Selagor Darul Ehsan*,[324] the High Court addressed a challenge to Section 97 of the Child Act of 2001, which allows the *Agong* (king) to detain a child at his Majesty's pleasure.[325] The court noted that the definition of "child" as a human below the age of eighteen was consistent with provisions of the Convention of the Rights of the Child ("CRC"), to which Malaysia was party.[326] This was challenged by an application for a writ of habeas corpus on two grounds. First, it was claimed that the legislation exceeded legislative competence in breach of the separation of powers.[327] The basis for this argument was that the judicial function of sentencing was effectively wielded by the executive. Second, the defense relied heavily on the Privy Council decision of *Director of Public Prosecutors of Jamaica v. Mollison*[328] to challenge the constitutionality of the Child Act.[329] The respondent, who committed murder at age sixteen, was sentenced to indefinite detention at the Governor General's pleasure under the Jamaican Juvenile Act.[330] The Court of Appeal set aside this sentence as unconstitutional and recommended that a minimum twenty-year term be served. This was appealed. It was accepted that the detention at pleasure violated Section 15(1) of the Constitution, which required that persons charged with criminal offenses and whose liberty was deprived by sentence of law should be afforded a fair hearing by an

---

Constitution. In contrast, the more restrictive approach towards associational rights in the Indian case of *Mian Bashir Ahmad v. State*, A.I.R. 1982 Jammu & Kashmir 26 (India), was rejected given that their similar laws were motivated by a history which had "no parallel" in Malaysia: there, experience had caused political defections to be viewed as an evil, public order threat by undermining the workings of parliamentary democracy.

[324] Kok Wah Kuan v. Pengarah Penjara Kajang, Selagor Darul Ehsan, 5 MALAY. L.J 193 (Kuala Lumpur, High Ct. 2004) (deciding that the real issue was whether legislating Section 97(2) of the Child Rights Act constituted an intrusion in judicial power, an issue that could only be brought by a process instituted under Article 4(3) of the Malaysian Constitution, not a writ for habeas corpus).

[325] Child Act, 2001, ACT NO. 611 (Malay.).

[326] *Kok Wah Kuan*, 5 MALAY. L.J. at 216-17.

[327] *Id.* at 200.

[328] Dir. of Pub. Prosecutors of Jam. v. Mollison, (2003) 2 W.L.R. 1160 (P.C.) (Eng.).

[329] *Kok Wah Kuan*, 5 MALAY. L.J. at 201.

[330] Juvenile Act, 1951, ch. 42 (Jam.).

impartial court.[331] This is because detention was at the discretion of the executive, contrary to the separation of powers.[332]

Judge Heliliah noted that the Privy Council's approach in *Mollison* was heavily influenced by Article 6 of European Convention on Human Rights jurisprudence (this guarantees a "fair and public hearing...by an independent and impartial tribunal" of the European Court of Human Rights, by way of the Human Rights Act, which incorporated the Convention and affected "the judicial attitude towards the death sentence").[333] He cited extensively from *Human Rights and Criminal Justice*, where the authors noted that decisions from the European Court of Human Rights guided Convention states in assessing the compatibility of their domestic law with Convention Standards and that the Convention had become "a constitutional instrument of European public order in the field of human rights" and the "most important legal and political common denominator" of European states.[334] The authors further noted that the European Convention on Human Rights inspired the human rights chapters of many constitutions in Commonwealth Africa and the Caribbean and that "[c]ommonwealth courts have come to accept the importance of interpreting equivalent constitutional guarantees in the light of their history and sources" and even pronouncements by national courts or international institutions on "provisions similar to constitutional human rights provisions."[335] Consequently, decisions by the European Court of Human Rights have been cited with approval by the constitutional courts of Canada, New Zealand, South Africa, Hong Kong, India, Zimbabwe, and Mauritius and have served as "a useful source of guidance" for the Privy Council. The authors concluded that this "cross-fertilization of jurisprudence reflects not only the close relationship between the various texts but also the universality of the underlying concepts and values."[336]

The Court considered cases from the European Court of Human Rights that addressed the same problem the Malaysian High Court was facing, relating to persons detained at Her Majesty's Pleasure who were entitled to the same regular periodic review by the Parole Board as discretionary life sentence prisoners.[337] The European Court of Human

---

[331] *Kok Wah Kuan*, 5 MALAY. L.J. at 202.

[332] The court cited *Hinds v. Queen*, [1977] A.C. 195, and *Liyanage v. Queen*, [1967] 1 AC. 259, 287-88, for this last proposition.

[333] *Kok Wah Kuan*, 5 MALAY. L.J. at 204.

[334] BEN EMMERSON & ANDREW ASHWORTH, HUMAN RIGHTS AND CRIMINAL JUSTICE 1, 1-14 (2001).

[335] *Id., quoted in Kok Wah Kuan*, 5 MALAY. L.J. at 205.

[336] *Id., quoted in Kok Wah Kuan*, 5 MALAY. L.J. at 205.

[337] Specifically, the defense counsel brought *Abed Hussein v. United Kingdom*, 22 Eur. H.R. Rep. 1 (1996), to the court's attention.

Rights in *Abed Hussein v. United Kingdom* found that the Home Secretary's (part of the Executive) involvement in fixing the tariff to be imposed violated Article 6(1) of the Convention, as it was a "sentencing exercise." It also violated Article 5(4) by not providing for periodic judicial review of the lawfulness of continued detention, which would allow new issues to be considered; hence, the trial judge now sets the tariff in the U.K.

Owing to the influence of the Human Rights Act, the interpretive approach of English courts in developing case law was "no longer dominated by a search for the intention of Parliament." Rather the court's first duty was "to adopt any possible construction which is compatible with Convention rights."[338] If not possible, the court could issue the remedy of a declaration of incompatibility. Thus, since the court in *Mollison* was concerned with giving effect to the interpretation and application of Article 6 of the Convention, to ensure compliance with the Convention, it was not an apt import into Malaysia.

The High Court declined to apply *Mollison* based on several factors. The Child Act related not to a life sentence but the possibility of indefinite detention at the *Agong's* pleasure. Were *Mollison* "to be transported and interposed in the context of the Malaysian constitution," it would result in taking cognizance of the argument that the child's final detention was not judicially determined. The High Court noted that the *Agong* was statutorily entrusted with this determination. Section 97 of the Child Act of 2001 was said to violate Article 5(2) and fail to afford the applicant a fair hearing.[339] The judge noted the Privy Council in *Mollison* was applying the European Convention on Human Rights to Jamaica. Lord Bingham noted that the Jamaican constitutional chapter on rights and freedoms was loosely based on the Convention and must be broadly interpreted because the constitution "is not trapped in a time warp" but must reflect societal needs through organic evolution.[340] The judge stated that while the Privy Council decisions may appear to have been making general pronouncements on the doctrine of the separation of powers, the Law Lords were "engaged in the judicial exercise of interpreting the

---

[338] *Kok Wah Kuan*, 5 MALAY. L.J. at 207-08 (discussing R. v. Sec'y of State for Home Dep't, (2002) 4 All E.R. 1089 (Eng.)). Section 29 of the Crime (Sentences) Act, 1997, ch. 43, allowed the Home Secretary to set the tariff for a convicted murderer. The court in *Kok Wah Kuan* found this to violate Article 6(1) of the European Convention on Human Rights since the Home Secretary, as part of the executive branch, was involved in the judicial function of sentencing, and the "complete functional separation of the judiciary from the executive was fundamental since the rule of law depended on it." Thus, for the court to find that Section 29 precluded the Home Secretary's participation would "not be judicial interpretation but judicial vandalism." Consequently, their Lordships declared that Section 29 of the Act was incompatible with Article 6 of the Convention.

[339] *Id.* at 218.

[340] *Id.* at 216.

applicable provisions"[341] and "judicial activism" was properly invoked in the context of interpreting sections of the Human Rights Act. That is, Privy Council decisions, being influenced by the Human Rights Act, which embodies the will of Parliament, could not be taken to be generally persuasive, since they operated within the Convention context. The Human Rights Act had caused a rights-based approach to constitutional interpretation to be developed, given that it was unlawful for a public authority, including the courts, to act incompatibly with Convention rights. Thus it was not appropriate for English cases like *Mollison* be "implanted" into Malaysia as English cases were decided within a particular statutory context. This statutory scheme provided a mechanism to ensure compatibility of English legislation with the Convention "but also provisions that have the object to ensure that judicial precedent of in the House Lords, Privy Council and the European Courts do not diverge."[342] This could not be done "without the High Court indulging in the exercise of rewriting legislation, and not judicial innovation."[343]

E. Reasoning Backward: Selective Citing to Buttress Pre-Determined Conclusions

In some cases, it is apparent that judges have a predetermined political agenda through which they construe constitutional issues; foreign case law is selectively invoked to buttress these predetermined conclusions.

This is especially apparent in the field of religious freedom where some Malaysian courts have employed a revisionist approach towards construing Article 3 of the Malaysian Constitution. This Article refers to Islam as the religion of the Federation, pursuant to the politicized vision of certain judges that Malaysia is an Islamic rather than a secular state, as discussed below. This approach is justified on the basis that the Constitution is a "living tree," leaving open to change the principle of secularity upon which multicultural Malaysia was founded.[344]

In *Meor Atiqulrahman v. Fatimah bte Sihi*[345] the Seremban High Court ruled that suspension of four Muslim pupils from school for breaching educational policy by wearing the serban (Muslim turban) was

---

[341] *Id.* at 219.
[342] *Id.* at 225.
[343] *Id.*
[344] FEDERATION OF MALAYA CONSTITUTIONAL PROPOSALS para. 57, *reprinted in* TAN & THIO, *supra* note 24, at 994 ("There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State...").
[345] Meor Atiqulrahman v. Fatimah bte Sihi, 5 MALAY. L.J. 375 (Seremban, High Ct. 2000).

unconstitutional, violating the constitutional right of religious practice, guaranteed under Article 11(1) read with Article 3 of the Malaysian Constitution.[346] Wearing serban was considered valid according to *hukum syarak* (Islamic law).

The Judge Mohd Noor Abdullah tried to argue that the reference to "Islam" in the Constitution was not meant to be merely ceremonial or confined to rituals and customs; rather, it was to be given a more robust role as a source of public law values. This entirely revisionist reading disregarded the principles of the social compact of multiracial Malaysia.[347] He wanted Islam to be appreciated as *ad-deen* in consisting of

> all activities involved in the human life from birth till death; from the waking of the morning to the sleeping of the night as shown by the Rasulullah who obtained his revelations (*wahyu*) from Allah and recorded them in the Quran. Islam acknowledges Judaism and Christianity and recognizes the Taurat, Zabur, and Injil. Islam is a universal religion that can be accepted by all other religions.[348]

Judge Abdullah's version of Islam was to shape the contours of constitutional religious liberties. For example, he said that had the education officials properly accorded Islam its rightful role, the officials would reverse the current uniform policy for schoolboys. The current policy required all pupils were to wear short trousers, with the option to wear long trousers if their parents so required. He argued that school uniforms rule undermined the Islam religion where secular values were prioritized, since the uniform policy, in his opinion, did not conform to Islamic requirements. What was needed was for the policy to be reconfigured to require long trousers for schoolboys, with an option to wear shorts.

In defining "religion," the judge drew from the Indian Constitution, although he added, "It would be more accurate and relevant

---

[346] *See* FED. CONST. MALAY. art. 3 ("Islam is the religion of the Federation but other religions may be practised peacefully in any parts of the Federation.").

[347] The Reid Commission noted in relation to Article 3 of the Malaysian Constitution: "the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply the state is not a secular state. There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam." REID COMMISION, FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION REPORT para. 161 (1956-57), *reprinted in* TAN & THIO, *supra* note 24, at 968.

[348] *Meor Atiqulrahman*, 5 MALAY. L.J. at 381.

for me to refer to the Constitution of Pakistan but unfortunately that cannot be found in the Court Library." Presumably, this is because the Constitution of Pakistan is an Islamic one.[349] The definition of "religion" in Indian jurisprudence transcended belief and include practices, rituals, and observances, extending even to matters of food and dress.

The Court of Appeal in *Fatimah bte Sihi v. Meor Atiqulrahman*[350] overruled the High Court's decision and found that wearing serban was not religiously mandated. In deciding this issue, Court of Appeal Judge Gopal Sri Ram referred to a series of Indian case law that dealt with Article 25 of the Indian Constitution, which was the "Indian equipollent of our [A]rticle 11(1),"[351] conferring on a person "freedom of conscience and free profession, practice and propagation of religion." The Indian decisions held that only religious practices forming "an essential and integral part of the religion" were protected by Article 25[352] and that whether any particular practice was essential was a question of evidence. This proposition the Court of Appeal wholly endorsed, noting the only evidence before it indicated that it was permissible, not mandatory for a male Muslim to wear a serban:

> There was not a shred of evidence before the learned judge confirming that the wearing of a serban is mandatory in Islam and is therefore an integral part of Islam. Accordingly, the learned judge appears to have acted on his own intuition instead of on the evidence. His decision is therefore vulnerable to appellate correction.[353]

However, despite this Court of Appeal precedent, Judge Thamby Chik in *Lina Joy v. Majlis Agama Islam Wilayah*[354] did not find Indian cases helpful in dealing with issues of apostasy because his idea of religious freedom did not extend to religious free conscience, contrary to international human rights standards. He expressly rejected Indian cases as these emanated from a secular state, and he numbers amongst the judges who support the idea of Malaysia as an Islamic state, contrary to

---

[349] *See* PAK. CONST. pmbl. ("Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."). Article 1 declares Pakistan to be an Islamic republic, while Article 2 provides "Islam shall be the State religion of Pakistan." PAK. CONST. art. 2.

[350] Fatimah bte Sihi v. Meor Atiqulrahman, 2 MALAY. L.J. 25 (Putrajaya, C.A. 2005).

[351] *Id.* at 28.

[352] *Id.* at 29 (citing Javed v. State of Haryana, A.I.R. 2003 S.C. 3057 (India); Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, A.I.R. 1954 S.C. 282 (India); Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1962 S.C. 853 (India); Comm'r of Police v. Acharya Jagadishwaranada Avadhuta, 2 L.R.I. 39 (2004) (India)).

[353] *Fatimah bte Sihi*, 2 MALAY. L.J. at 30.

[354] Lina Joy v. Majlis Agama Islam Wilayah, 2 MALAY. L.J. 119 (Kuala Lumpur, High Ct. 2004).

constitutional history.[355] Judge Chik located a "clear nexus" between Articles 3(1) and 11, since both Articles dealt with religion and should be harmoniously construed together.[356] He rejected the plaintiff's claim to a right to *murtad* (change religion or become an apostate) and said her reading of Article 11 as giving her an "unqualified right to convert out of the Islamic religion" would have been "correct" if read in the context of Article 25 of the Indian Constitution, which guaranteed the "freedom of conscience." [357] However, these words are absent from Malaysia's Article 11(1) rights. This issue had to be decided by the religious courts applying Syariah law, rather than civil courts, which were bound by duty to protect constitutional rights.[358]

Judge Chik criticized the plaintiff's "extensive reference" to the Indian Constitution as "clearly misplaced" because the Forty-second Amendment of 1976 declares India to be a secular state. The Malaysian Constitution contained no such provision, and Judge Chik emphasized that other constitutions were of "little assistance to us because our Constitution now stands on its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied."[359] However, Judge Chik was not merely interpreting the text but rather revising it in his own preferred Malay nationalist-Islamic image. In so doing, Judge Chik was rejecting liberal understandings of religious freedom as including a right to change a religion. He then proffered a reading of Article 3(1) to the effect that Islam was the "main and dominant religion"[360] and that the Federation had "a duty to protect, defend and promote the religion of Islam." To allow Muslims the right to convert out of Islam without final determination by the Syariah courts would cause "uncertainty and confusion."[361] Judge Chik offered an interpretation of Islam that declared that religious profession should be without compulsion and that if a Muslim makes a declaration by deed poll that he renounces Islam, he becomes a *murtad*. Nevertheless, Judge Chik asserted that it was for a Syariah court to determine whether a person has become a *murtad* and such declarations of apostasy are rarely made. Indeed, apostates are subject to penalties in certain Malaysian states,

---

[355] *Id.* at 130 ("The plaintiff's extensive reference to the Indian Constitution in her submission is clearly misplaced. The Forty Second Amendment of 1976 has declared India to be a secular state. There is no such pronouncement in the [Federal Constitution]").
[356] *Id.* at 129.
[357] *Id.* at 130.
[358] Syariah law is Islamic law. In classic Islamic theory, Syariah law is rooted in divine revelation. WU MIN AUN, *supra* note 13, at 119, 174-211.
[359] *Lina Joy,* 2 MALAY. L.J. 119 (quoting Loh Kooi Choon v. Gov't of Malay., 2 MALAY. L.J. 187 (C.A. 1977)).
[360] *Id.*
[361] *Id.* at 132.

ranging from fines, detentions at faith rehabilitation centers, and even the death sentence. Thus, individual rights are subordinated to community concerns, and the courts have abdicated their guardianship roles in this respect by applying their own revisionist constructions of history to interpret Article 3 of the Malaysian Constitution.

Notably, the Malaysian court did not cite any Singaporean cases, as Singapore adopts a distinct model of religious liberty and pluralism. At independence, Singapore omitted to have constitutional confessions of a faith, constituting the republic on the principle of secularity. It also does not afford Islam a privileged status as it has no anti-propagation laws, which Article 11(4) of the Malaysian Constitution expressly allows. Singapore recognizes the principle of freedom of conscience. The Court of Appeal in *Nappalli Peter Williams v. Institute of Technical Education*[362] noted that "the protection of freedom of religion under our constitution is premised on removing restrictions to one's choice of religious belief," a form of "accommodative secularism."[363] Current Malaysian case law seeks to ensure restrictions are placed on former Muslims converting out of Islam to make the exercise of religious free conscience ineffective and illusory.

IV. CONSTITUTIONAL ADJUDICATION TO TRANSCEND THE FOUR WALLS

There have been instances where Malaysian and Singaporean courts have "positively" looked beyond the four walls and drawn inspiration from transnational sources to aid the rights adjudicatory process in various ways.

A. To Test and Confirm the Soundness of Principled Normative Reasoning by Showing Consistency with Foreign Trends and Progressive Development

[362] Nappalli Peter Williams v. Inst. of Technical Educ., 2 SING. L. REP. 569, 577 (1999), *aff'g* Peter Williams Nappalli v. Inst. of Technical Educ., SING. HIGH CT. 351, 352 (High Ct. 1998). In *Peter Williams Nappalli*, the trial judge decided that saying the National Pledge and singing the Anthem "is obviously not a religious ceremony," undercutting any claim that Article 16(3) of the Singaporean Constitution, which safeguards a person from being compelled to take part in any religious ceremony other than his own, was violated. Thus, there was no coerced participation in a religious ceremony. If not, as the judge on appeal rhetorically posed, "How can the same Constitution guarantee religious freedom if by asking citizens to pledge their allegiance to country it is coercing participation in a religious ceremony? This excruciatingly absurd interpretation cannot have been what was envisaged by the authors of the Constitution."

[363] *Id.* at 576.

After a careful consideration of foreign Commonwealth trends, the Court of Appeal in *Chng Suan Tze v. Minister of Home Affairs* found as a matter of principle that the exercise of power under Sections 8 and 10 of the 1960 Malaysian Internal Security Act ("ISA") was subject to the objective test of review.[364] The court rejected the subjective test propounded in *Karam Singh* and its progeny. The court could, through judicial review, ask whether the executive's decision was based on national security considerations although it would not question the executive's assessment of what national security required. That is, the court cannot question the necessity for detention but can ensure that the executive relied on matters that fell within the specific purposes of the Act.

Counsel in *Mohamad Ezam v. Ketua Polis Negara*,[365] a case concerning the detention of "reformasi" activist in April 2001 under Section 73 of the ISA,[366] argued that the Court should reject preceding Malaysian authorities and adopt the objective test set out in *Chng Suan Tze v. Minister of Home Affairs*.[367] The Federal Court accepted this argument with respect to Section 73 (not Section 8, owing to a legislative ouster of review except on procedural grounds)[368] and issued a writ of habeas corpus on a finding of *mala fides* (bad faith). Aside from *Chng Suan Tze*, Federal Court Judge Abdul Malek Ahmad concluded that the test for Section 73 of the ISA was objective. This conclusion was drawn after a careful consideration of case law from the Supreme Courts of Zimbabwe,[369] South West Africa,[370] Bangladesh,[371] and South Africa.[372]

---

[364] Chng Suan Tze v. Minister of Home Aff., 1 MALAY. L.J. 69 (1989) (Sing.); *see also* Internal Security Act, 1960, ACT NO. 82 (Malay.).

[365] Mohamad Ezam bin Mohd Nor v. Ketua Polis Negara, 4 MALAY. L.J. 449 (Kuala Lumpur, Fed. Ct. 2002).

[366] This provides that a person may be detained for a period not exceeding sixty days, without an ISA Section 8 order. A detention for more than twenty-four hours requires authorization by an official of no lower rank than an Inspector and for more than forty-eight hours, authorization by an official of no lower rank than an Assistant Superintendent. *See* Internal Security Act, 1960, ACT NO. 82, § 73 (Malay.). *See generally* Nicole Fritz & Martin Flaherty, *Unjust order: Malaysia's Internal Security Act*, 26 Fordham Int'l L.J. 1345 (2003), *available at* http://www.crowleyprogram.org/pubs/malaysiareport.pdf.

[367] *Chng Suan Tze*, 1 MALAY. L.J. at 69.

[368] ISA Section 8b provides an ouster in respect of acts done by the *Agong* (King) or Minister and does not relate to ISA Section 73(1) ISA, which deals with the powers of policemen who must have "reason to believe" that a person is a threat to national security before making an arrest.

[369] *Mohamad Ezam*, 4 MALAY. L.J. at 503 (discussing Minister of Home Aff. v. Austin, 1 ZIMB. L. REP. (Sup. Ct. 1986).

[370] *Mohamad Ezam*, 4 MALAY. L.J. at 504 (discussing Katofa v. Adm'r Gen. for S.W. Afr., 1985 (4) SALR 211 (S.W. Afr.)).

[371] Rahman v. Bangl., represented by Sec'y Ministry of Home Aff., 1998 INTERIGHTS COMMONWEALTH HUM. RTS. L. 32 (Mar. 1, 1998), *available at* http://www.worldlii.org/int/cases/ICHRL/1998/32.html.

B. *To help Develop Normative Reasoning and Interpret the Content of a Right*

It is clear that the courts feel more comfortable or are more ready to borrow from foreign judicial reasoning where they feel that the textual formulation of a particular liberties clause closely resembles the corresponding clause in a foreign constitutional text. For example, in *Koo Tee Yam v. Timbalan Menteri*,[373] the Malaysian High Court in addressing criminal process rights found in Article 5 that this was *in pari materia* with Article 40 of the Constitution of Ireland. Hence the test enunciated in *State (Trimbole) v. Government of Mountioy Prison*[374] was imported.[375] In *Trimbole*, in relation to informing an accused of the grounds of arrest, the test was that the court should not allow "a conscious and deliberate violation of rights to reach its planned results," *e.g.*, fish for incriminatory evidence.[376]

Similarly, the High Court, in relation to the rights of a detained person to make representations before an advisory board under Article 151 of the Malaysian Constitution, noted that "Article 151(1) of our Constitution is equivalent to Article 22(5) of the Indian Constitution" and, consequently, imported the test in *Shibban Lai v. State of Uttar Pradesh*.[377] This test related to whether the courts could review the sufficiency of the factual allegations constitutionally guaranteed to a detainee under a preventive detention law, pegging the test of sufficiency, a justiciable issue, as to whether it was "sufficient to enable the detenu to make an effective representation."[378] The High Court further adopted and applied an Indian Supreme Court decision on what constitutes a "vague ground," so as to find that the detainee was not given sufficient information to make effective representation.[379]

The courts will also borrow rationales from foreign decisions to develop localized thinking on a related matter. In *Abdul Nasir bin Amer Hamsah v. Public Prosecutor*,[380] the Singaporean Court of Appeal clarified that "life imprisonment" meant the duration of the natural life within the context of the Penal Code, despite the executive practice of

---

[372] *Mohamad Ezam*, 4 MALAY. L.J. at 504 (discussing Matanzima v. Minister of Police, Transkei, 1992 (2) SALR 401 (S. Afr.).

[373] Koo Tee Yam v. Timbalan Menteri, 236 MALAY. L.J. UNREP. 1 (Muar, High Ct. 2005).

[374] *See* State (Trimbole) v. Gov't of Mountioy Prison, [1985] I.R. 550 (Ir.).

[375] *Koo Tee Yam*, 236 MALAY. L.J. UNREP. at 16.

[376] *Id.* at 16.

[377] Shibban Lai v. State of Uttar Pradesh, A.I.R. 1954 S.C. 179, 190 (India).

[378] *Koo Tee Yam*, 236 MALAY. L.J. UNREP. at 43 (quoting BK Mukherjea), *aff'g* Karem Singh v. Minister of Home Aff., 2 MALAY. L.J. 129 (1969).

[379] *Id.* at 43-44 (citing State of Bombay v. Atma Ram, A.I.R. 1951 S.C. 157, 164 (India)).

[380] Abdul Nasir bin Amer Hamsah v. Pub. Prosecutor, 3 SING. L. REP. 643 (1997).

equating it with a twenty-year tariff. The court had to decide whether its judicial pronouncement was to be accorded retroactive or prospective effect, for fear of disrupting the legitimate expectation of offenders who had arranged their lives according to such expectation, as it involved "the fundamental matter of a person's liberty for the rest of his life."[381] In so doing, the court drew inspiration from the principle behind *nullum crimen nulla poena sine lege* (no crime without law making it so), entrenched in Article 11(1) of the Singaporean Constitution (no one shall suffer greater punishment for an offense than was prescribed by law at the time it was committed). It noted that the U.S. Constitution and European Convention on Human Rights prohibited retrospective creation of criminality and that drawing from the underlying rationale, it was useful to think through the immediate problem.[382] The court mentioned the Canadian case of *Reference re Sections 193 and 195.1(1)(c) of Criminal Code (Manitoba)*,[383] where, in discussing the *nullum* principle, Judge Lamer noted that the bulk of jurisprudence was from the U.S. Judge Lamer discussed American authorities "so as to provide a context for discussions of the doctrine's potential application in Canadian law."[384]

The U.S. Supreme Court ruled that impermissibly vague law was void for violating the Due Process Clause, as it did not provide sufficient guidelines for the reliable ordering of lives.[385] The rationale for such law was clear:

> It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards.[386]

The Singaporean court held that the rationale of the *nullum* principle[387] was applicable to first-time judicial pronouncements and that those who

---

[381] *Id.* at 657.
[382] *Id.* at 655.
[383] *Reference re* ss. 193 & 195.1(1)(c) of Crim. Code (Man.), [1990] 1 S.C.R. 1124 (Can.).
[384] *Abdul Nasir*, 3 SING. L. REP. at 656.
[385] On the point of a law being void for vagueness, the Supreme Court of Canada in *Reference re Sections 193 & 195.1(1)(c) of Criminal Code (Manitoba)*, 1 S.C.R. at 1151-52, referred to two U.S. cases: *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) and *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927).
[386] *Reference re* ss. 193 & 195.1(1)(c) of Crim. Code (Man.), 1 S.C.R. at 1152, *quoted in Abdul Nasir*, 3 SING. L. REP. at 656. *See also* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1033 (2d ed. Foundation Press 1988).
[387] *Abdul Nasir*, 3 SING. L. REP. at 656.

conducted their affairs on the basis of reasonable expectation should not be penalized. The court declared it wanted to "extrapolate and emphasize" that the legitimate expectations principle might sometimes warrant protection even though it was not a legal right.[388] Thus, the case was given prospective effect only, on the "analogous reasoning"[389] with prospective judicial overruling that where a first-time interpretation of a legally prescribed punishment would result "in an expanded meaning," contrary to what could be legitimately expected, then the judicial pronouncement must be given prospective effect to prevent prejudice and injustice to the accused.

C. *To Promote Progressive Development of Jurisprudence, especially in Relatively Novel Areas (Finding Solutions)*

1. Judicial Notice of Global Trends

The resort to foreign decisions and international law in taking judicial notice of global developments to aid in the progressive development of jurisprudence, particularly with respect to relatively novel areas, is a clear trend.

There have been a series of important cases[390] concerning the rights of indigenous peoples before the Malaysian courts.[391] The concept of native title was established in Malaysian law through the Federal Court case of *Adong bin Kuwau v. Kerajaan Negeri Johor*.[392] This was soon followed by two High Court decisions: *Nor Anak Nyawai v. Borneo Plantations*,[393] a case involving the acquisition of lands claimed by native

---

[388] *Id.* at 657.

[389] *Id.* at 658.

[390] Adong bin Kuwau v. Kerajaan Negeri Johor, 1 MALAY. L.J. 418 (Johor Bahru, High Ct. 1997); Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY. L.J. 241 (Kuching, High Ct. 2001); Sagong bin Tasi v. Kerajaan Negeri Selangor, 2 MALAY. L.J. 591 (Shah Alam, High Ct. 2002).

[391] The Constitution of Malaysia gives the federal government legislative jurisdiction over the "welfare of the aborigines" and provides for the "protection, well-being [and] advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land)...." *See, e.g.*, FED. CONST. MALAY. pt. II, ch. 8 & pt. III (amended 1963). Legislative measures to "protect" the Orang Asli date to 1939. The governing framework, the Aboriginal Peoples Act, dates from 1954 and was revised in 1967 and 1974. The Department of the Aboriginal Peoples' Affairs has existed since 1954. Under the Malaysian legal system, certain lands are reserved for aboriginal peoples, who also have recognized rights to hunt and gather over additional lands. *See* Aboriginal Peoples Act, 1954, ACT NO. 134 (revised July 1, 1974) (Malay.).

[392] *Adong bin Kuwau*, 1 MALAY. L.J. at 418 (awarding compensation to Orang Asli tribe [Jakun] for loss of ancestral lands in Johor after the state government took the land and entered into an agreement with the Singapore Public Utilities Board to construct a dam to supply water to Johor and Singapore).

[393] *Nor Anak Nyawai*, 6 MALAY. L.J. at 241. The Sarawak Land and Survey Department granted a license to the Borneo Paper and Pulp Plantation (BPP) to develop a one-hectare plantation for

Ibans in Sarawak for a tree plantation, and *Sagong bin Tasi v. Kerajaan Negeri Selangor*,[394] a case involving the taking of lands occupied by Temuans, an aboriginal tribe, in conjunction with the building of the Kuala Lumpur International Airport. These decisions heavily relied on the reasoning in foreign decisions from the U.S., Canada, and Australia with respect to the issue of native title and property rights, as well as certain international law instruments. The right to property is safeguarded under Article 13 of the Malaysian Constitution, which requires that adequate compensation be paid where land is expropriated.

It was in the seminal case (which has been called "Malaysia's *Mabo*")[395] of *Adong bin Kuwau v. Kerajaan Negeri*[396] that aboriginal people in Malaysia first sued the government for their traditional rights under law before a judicial forum. The issues related to deprivation of vast areas of traditional, ancestral land where they did not stay but where they foraged for their livelihood.

Conscious that this was a relatively novel issue in the Malaysian context, Court of Appeal Judge Mokhtar Sidin stated that the Court "had to turn to various sources—including cases, articles and other writings both from within and outside Malaysia, to determine the plaintiffs' rights, if any."[397] At issue were the content of indigenous rights and the method of compensation for state acquired native lands. Judge Sidin took judicial notice of the worldwide trend towards the recognition of native peoples' rights in the aftermath of the Second World War, in countries which practice the Torrens land law system (where titles are issued pursuant to statutory powers). Specifically, in Canada, New Zealand, and Australia, the courts had "greatly expounded" on native rights over their lands.[398] Indeed, Judge Ahmad in *Sagong bin Tasi* noted that the *Adong* case "was influenced by the persuasive authority" of various Canadian and Australian cases.[399]

---

growing a fast-growing tree species. The BPP began to cut down forests claimed by the Iban community of Rumah Nor. The villagers were never informed or consulted and upon discovering the damage caused by logging to the land, sued via representative action to stop the logging and trespass.

[394] *Sagong bin Tasi*, 2 MALAY. L.J. at 591.

[395] Garth Nettheim, *Malaysia's Mabo Case*, 4 Indigenous Law Bulletin No. 28, 20 (2000), *available at* http://www.austlii.edu.au/au/journals/ILB/2000/126.html (referring to Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1 (Austl.)).

[396] *Adong bin Kuwau*, 1 MALAY. L.J. at 418, *aff'd*, Adong bin Kuwau v. Kerajaan Negeri, 2 MALAY. L.J. 158 (C.A. 1998)).

[397] *Id.* at 424.

[398] *Id.* at 426.

[399] *Sagong bin Tasi*, 2 MALAY. L.J. at 591. While purporting to follow *Mabo v. Queensland* [*No. 2*], the court in *Adong bin Kuwau*, 2 MALAY. L.J. at 158, did not consider a proprietary interest in the land itself to be an essential character of native title.

2. Common Law Title and Appreciating Indigenous Conceptions of Land

In discussing the rights of aboriginal peoples at common law, Court of Appeal Judge Sidin examined cases from the U.S.,[400] Canada,[401] and Australia[402] and early Privy Council decisions from Africa[403] to show that there was common law recognition of native land rights. The rights were in the form not of individual ownership but a "communal usufructuary occupation."[404] Judge Sidin approved the proposition that native rights in their land existed and continued to exist despite a change in sovereignty, at common law, independent of statutory recognition.[405] Specifically, he cited the Australian cases of *Mabo v. Queensland [No. 2]* and *Pareroultja v. Tickner* as authorities for the proposition that native claims to their traditional, ancestral land rights exist and are recognized by the common law of Australia.[406] Court of Appeal Judge Sidin noted that land disputes arose with the advent of colonialism when the British system of government was introduced, including the demarcation of lands.[407]

Adong was subsequently applied in the Sarawak context in *Nor Anak Nyawai v. Borneo Pulp Plantation*,[408] where the court confirmed that native customary rights are similar to native title rights of Australian aboriginals. Judge Chin borrowed the description of "native title" in *Mabo*, which is that "it has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by

---

[400] Worcester v. Georgia, 31 U.S. 530 (1832); Mitchel v. U.S., 34 U.S. 711 (1835) (noting that the Indians' "right of occupancy is considered as sacred as the fee-simple of the whites").

[401] Calder v. Att'y Gen. of B.C., [1973] 34 D.L.R. (3d) 145 (Can.), *cited with approval in* Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY. L.J. 241, 245-46 (Kuching, High Ct. 2001) (for the proposition that "the mere change in sovereignty does not extinguish native title to land," though this can be done by a "clear and plain intention to do so").

[402] Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1 (Austl.); Pareroultja v. Tickner (1993) 117 A.L.R. 206 (Austl.).

[403] *In re* S. Rhodesia, [1918] A.C. 211, 233-34 (P.C.) (U.K.) (observing the "difficulty" in estimating the rights of aboriginal tribes). The court noted that certain tribes were "so low in the scale of social organization" that their conceptions of rights and duties could not be "reconciled with the institutions or the legal ideas of civilized society." The court also recognized the existence of "indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own."

[404] Amodu Tijani v. Sec'y, S. Nig., [1921] 2 A.C. 399 (P.C.) (U.K.).

[405] Hamlet of Baker Lake v. Minister of Indian Aff. & N. Dev., [1980] 107 D.L.R. (3d) 513, 542 (Can.).

[406] *See* cases cited *supra* note 402.

[407] Adong bin Kuwau v. Kerajaan Negeri Johor, 1 MALAY. L.J., 418, 430 (Johor Bahru, High Ct. 1997).

[408] Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY. L.J. 241 (Kuching, High Ct. 2001).

the indigenous inhabitants of a territory."[409] Furthermore, he used *Wik Peoples v. Queensland*[410] to find that the rights existed independent of legislative, executive, or judicial declaration—while they can be extinguished by statute, they do not owe their existence to statute, as they pre-exist legislation. Native title was not lost by colonization, leaving aborigines as trespassers in their own land.[411]

3. Elaborating on the Substance of Indigenous Land Rights

Borrowing from foreign decisions, namely *Calder* and *Mabo*, Judge Sidin in *Adong* defined the content of aboriginal peoples' rights over the land to include "the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself" but not to include rights in the land itself in the "modern sense" of being able to convey, lease and rent out the land or its produce, stemming from their "continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial."[412] This reflects the appreciation that title may not be individual but communal[413] and the collective character of indigenous native title.[414] Borrowing from *Calder*, Judge Sidin ruled that the common law rights of aborigines included "the right to live on their land as their forefathers had lived," which extended to "future generations," showing cultural sensitivity to the indigenous conception of land in appreciating the communal and generational aspect of native title.[415]

---

[409] *Id.* at 268-69.

[410] Wik Peoples v. Queensland, (1996-97) 187 C.L.R. 1, 84 (Austl.).

[411] Miriuwung & Gejerrong People v. State of W. Austl. (1998) 159 A.L.R. 483, 498 (Austl.), *cited in* Sagong bin Tasi v. Kerajaan Negeri Selangor, 2 MALAY. L.J. 591, 612 (Shah Alam, High Ct. 2002). For a case analysis, see Cheah Wui Ling, *Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start?*, 2 L. SOC. JUST. & GLOBAL DEV. J. (2004), *available at* http://www.go.warwick.ac.uk/elj/lgd/2004_2/cheah (arguing that this case was an example where Malaysian courts considered international developments in indigenous rights and "attempted to incorporate such international legal developments into domestic law by progressively statutory and common law interpretation").

[412] *Adong bin Kuwau* , 1 MALAY. L.J. at 430 (Johor Bahru, High Ct. 1997).

[413] *Sagong bin Tasi*, 2 MALAY. L.J. at 611-12 (citing Amodu Tijani v. Sec'y, S. Nig. [1921] 2 A.C. 399 (P.C.) (U.K.), for the holding that land acquired for a public purpose from native people should be compensated on the basis of full land ownership rather than merely the right of control and management of the land).

[414] Nevertheless, Justice Brennan in the Australian High Court, cited by the Malaysian High Court in *Sagong bin Tasi*, 2 MALAY. L.J. at 591, recognized that individuals could by community customs possess proprietorship over their individual plots.

[415] The court also declared that native title should be determined "by reference to the traditional laws and customs of the indigenous inhabitants of the land, [since] Native title does not have the customary incidents of common law title to land, but it is recognized by the common law."

4. Constitutional Protection of Indigenous Rights: Article 13 of the Malaysian Constitution

In finding that the rights of aboriginal people at common law and statute[416] were proprietary rights that fell within the ambit of Article 13(1),[417] Court of Appeal Judge Sidin drew inspiration from Indian case law, noting that Articles 19(1)(f) and 31 of the Indian Constitution were similar to Article 13,[418] thus adopting the broad definition of "property" in *Rabindra Kumar v. Forest Officer*.[419] He found that the alienation of the lands in Linggiu Valley deprived the plaintiffs of their proprietary rights over the land, extinguished their right to collect jungle produce, and broke their continuous occupation of the land upon which their livelihood depended. This was effectuated through the National Land Code of 1965, which had no compensatory regime. Nevertheless, the learned judge found that Article 13(2) should be read into the statute to provide compensation. In computing compensation, Judge Sidin was sensitive to the fact that "native land is a far cry from titled land"; for the latter, adequate compensation must be enough that the citizen is able to restart elsewhere by buying another property or relocation. However:

> An aborigine will not be in the same category as the other Malaysian citizen, for an aborigine has special attachment to his land and without any skill, education or way to live as the other communities, he would find it very difficult, if not impossible, to relocate himself and start afresh.[420]

Pareroultja v. Tickner (1993) 117 A.L.R. 206, 213 (Austl.), *cited in Adong bin Kuwau*, 1 MALAY. L.J. at 418.

[416] *See* Aboriginal Peoples Act, 1954, ACT NO. 134 (revised July 1, 1974) (Malay.).

[417] This provides, "No person shall be deprived of property save in accordance with law." Furthermore, compulsory acquisition should be accompanied by "adequate compensation." FED. CONST. MALAY. art. 13(1).

[418] *Adong bin Kuwau*, 1 MALAY. L.J. at 433 (Sidin, J.) (noting the observation in *Selangor Pilot Association (1946) v. Government of Malaysia*, 2 MALAY. L.J. 66, 69 (1975), that Article 13 is not identical with but "approximates" the language of Article 31 of the Indian Constitution before amended in 1955, persuading Sidin to adopt the Indian Supreme Court's construction of the unamended Article 31).

[419] Rabindra Kumar v. Forest Officer, A.I.R. 1955 Manipur 49, 53-54 (India) (defining "property" as including both intangible rights and physical things, as well as rights incidental to the use, enjoyment, and disposition of intangible things).

[420] *Adong bin Kuwau*, 1 MALAY. L.J. at 435-36. The High Court in *Sagong bin Tasi v. Kerajaan Negeri Selangor*, 2 MALAY. L.J. 591 (Shah Alam, High Ct. 2002), found that any statutory provision for compensation should accord with Article 13(2).

Various interests in the land were identified: deprivation of heritage land, freedom of movement under Article 9(2) of the Malaysian Constitution, forest produce, and future living for the immediate family and future descendants.[421] The judge appreciated that aside from loss of land use, the "sentimental, cultural and heritage attachment is not objectively achievable for that is a subjective matter."[422] This reflects a pluralistic outlook on the particular cultural way land is viewed, which differs from mainstream society, and attempts to recognize the unique status of indigenous peoples. However, Cheah Wui Ling, an academic commentator, argues that the court did not go far enough by essentially equating indigenous ancestral land rights with those of a private individual's right to land and by applying the same compensation regime for compulsory acquisition on both.[423] Consequently, *Sagong bin Tasi* in recognizing native title at common law is but a "partial victory for Orang Asli land rights" because it fails to compute non-monetary loss into compensation schemes.[424]

The High Court expanded on the nature of the propriety interest that Orang Asli had in their customary, ancestral lands in *Sagong bin Tasi*.[425] The plaintiffs were aboriginal peoples, the Orang Asli of the Temuan tribe, who received written notices to vacate land they were occupying from the Sepang Land Administrator, which they refused to comply with due to dissatisfaction with the amount of compensation. They were later forcibly evicted from their settlement and their fruit trees, crops, and houses were demolished, the acquisition of land being a "small portion" of their traditional lands.[426] The deprivation of the plaintiffs' proprietary rights was found to be unlawful.[427] Judge Mohd Noor Ahmad found that they not only had a right over the land but an interest in the land, which the Temuans had continuously occupied for at least 210

---

[421] In *Adong bin Kuwau*, 1 MALAY. L.J. at 418, the judge in fixing compensation doubled the amount (market value) paid by the Singaporean government to the Johor government based on market value for land use, as part of the agreement to build a dam on the land (for the loss of revenue by the Johor government not for the land but what is above the land). This calculation was not only to reflect a "just figure" but also to enable the plaintiffs to "regenerate" post-dispossession in the traumatic process of relocation and resettlement. Nevertheless, the court did grapple with the difficulty of according a monetary value to the loss suffered by the Orang Asli.

[422] *Id.* at 436.

[423] *See* Cheah, *supra* note 411.

[424] This was done through a finding in *Sagong bin Tasi*, 2 MALAY. L.J. at 591, that "land occupied under customary right" in Section 2 of the Land Acquisition Act included Orang Asli native title within its ambit, even though the intent of the statute was to refer to lands occupied under the tribal *adat* in Negeri Sembilan and Malacca, rather than Orang Asli land rights. Land Acquisition Act, 1960, ACT. NO. 486 (Malay.).

[425] *Sagong bin Tasi*, 2 MALAY. L.J. at 591.

[426] *Id.* at 611.

[427] *Id.* at 617.

years, under customary right, in accordance with their culture relating to land and inheritance, which was canvassed in great detail before the court.[428] This did not include the jungles where they roamed to forage for their livelihood but just to the area of settlement, which was a question of fact.[429] Nevertheless, this case went further than *Adong* in recognizing the existence of native title to ancestral lands at common law, beyond just crops grown on the land. It also recognized that the Temuans suffered loss when their lands were trespassed consequent to the government's summary acquisition of their land; they were awarded damages.

Judge Ahmad observed that the court in *Adong* had not considered "important developments and clarifications made to aboriginal title by Canadian case law after the *Calder* case,"[430] noting that in *Delgammukw v. Queen*,[431] aboriginal title was specified to be a right in land, not merely a bundle of rights to engage in activities or to exclusive use and occupation of the land. Judge Ahmad said that refusal to recognize the propriety rights of aborigines would be to regress to the racist assumptions of Australian law pre-*Mabo*:

> [I]f the aboriginal people are now to be denied the recognition of their proprietary interest in their customary and ancestral lands, it would tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the 20th century where the laws, practices, customs and rules of the indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters. The reason being that when a territory was colonized by the Whites, it was regarded as practically unoccupied, without settled inhabitants or settled land, an empty place, desert and uncultivated even though the indigenous peoples had lived there since time immemorial because they were regarded as uncivilized inhabitants who lived in a primitive state of society.[432]

---

[428] Continuous occupation was found, for example, on the basis of the burial of the dead near the village in the belief that their spirits (*moyangs*) become the tribal protectors and needed appeasement. This was part of the distinct Temuan religion where religious rites were very "site specific." *Id.* at 605-06.

[429] *Id.* at 615.

[430] *Id.* at 614.

[431] Delgammukw v. Queen, [1997] 153 D.L.R. (4th) 193 (Can.).

[432] *Sagong bin Tasi*, 2 MALAY. L.J. at 615.

Judge Ahmad noted the influence of human rights law on the common law in quoting Judge Brennan's observations with respect to international human rights norms in *Mabo*:

> The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[433]

Malaysian courts have thus accepted that international law had an important influence on the development of the common law, especially when it declares the existence of universal human rights, and thus can be directly applicable in the domestic context.

5. Comporting with Transnational Standards

In finding that aborigines had a propriety interest both in and to their ancestral lands, Judge Ahmad found it necessary to keep in step with "the worldwide recognition now being given to aboriginal rights," finding that the aborigines had a propriety interest both in and to their ancestral lands.[434] Judge Ahmad noted that Judge Gopal Sri Ram for the Court of Appeal in *Adong* had stated that foreign decisions "deserve much respect."[435] Judge Ram said:

> My view is that, although I am inclined to wear blinkers in considering the issues involved in this case by confining only to our existing laws and local conditions, I am compelled not to be blinkered by the decisions of the courts of other jurisdictions which deserve much respect, in particular on the rights of the aboriginal

[433] *Id.*
[434] *Id.* at 615.
[435] *Id.* at 631.

> people which are of universal interest, especially when there is no clear and plain indication to the contrary in our laws.[436]

It would appear that the four walls are transcended where domestic law is silent and where the subject-matter is one of universal interest, as evidenced by the judge noting that his findings were in keeping with the "worldwide recognition of aboriginal rights."[437] Thus, this opens the door for the importation of international law standards to influence common law developments. Developments in other jurisdictions helped cultivate a sensitivity in Malaysian courts towards the culture of aboriginal peoples. This was demonstrated when the court accepted as evidence the oral histories of aboriginal societies relating to their practices, customs and traditions, and their relationship with land, subject to terms of the 1950 Evidence Act.[438] This meant accepted statements must be made by competent person, in the public or general interest, and on issues of customs and rights prior to the arising of a controversial issue.

In discussing the use of oral histories as evidence, the High Court in *Sagong bin Tasi* said, "the situation here is similar to the aboriginal peoples in the Canada,"[439] where the Supreme Court in *Delgammukw* said trial courts must approach evidence issues bearing in mind the difficulties "inherent in adjudicating aboriginal claims" and that evidence must be interpreted in the same spirit. This was necessary since many aboriginal societies did not keep written records at time of first contact and would therefore find it difficult to produce evidence of the pre-contact practices and traditions of their community. The court in accommodating aborigines would have to "come to terms with the oral histories" of these communities as these may be the only record of the past.[440] Clearly, this is an area of domestic law and policy that has been impacted and shaped by transnational sources.

D. To Serve an Educative Function

Judge Ian Chin in *Nor Anak Nyawai v. Borneo Pulp Plantation*[441] referred to the non-binding U.N. Draft Declaration on the Human Rights of Indigenous Peoples fairly extensively, citing Article 4 (right to

---

[436] *Id.* at 631.
[437] *Id.* at 615.
[438] Evidence Act, 1950, ACT NO. 56 (Malay.).
[439] *Sagong bin Tasi*, 2 MALAY. L.J. at 622.
[440] *Id.*
[441] Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY. L.J. 241, 297 (Kuching, High Ct. 2001).

maintain cultural characteristics), Article 7 (prohibition against ethnocide, cultural genocide and regulation of population transfers), Article 8 (distinct identities), Article 9 (right to belong to indigenous community), and Article 10 (prohibition against forcible removal from land). He underscored that these provisions were cited because they "provide valuable insight as to how we should approach matters concerning the natives," stressing that the draft declaration played "no part in my decision" on the case issues as it did not form "part of the law of our land." Rather, the design was to "show how wrong" the defendant government authorities were in their attitudes towards the Sarawak natives, particularly in the light of the natives' special constitutional position,[442] and to instruct the defendants on to the "global attitude towards natives."[443] Thus, international human rights law was cited for purposes of the censure and education of state officials.

E. To Fill a Lacunae in the Law

The Singaporean High Court drew from imminent trends in English case law to find a tort of harassment at common law. In *Malcomson Nicholas Hugh Bertram v. Naresh Kumar Mehta*,[444] the court had to deal with a case involving harassing conduct in the form of a former employee sending numerous emails and SMS messages to his employer. Despite a gap in the law, Judicial Commissioner Lee Seiu Kin declared that the time had come for Singaporean law to recognize a tort of harassment so that injunctions could be awarded in response to harassment. Judicial Commissioner Lee noted that English Lord Justice Millet in *Fine v. McLardy*[445] had observed that the absence at common law of a tort of interference with privacy, which constituted "a serious blot on our jurisprudence," might be "a thing of the past" with the "imminent incorporation" of the European Convention on Human Rights, which guaranteed privacy of the individual. Thus, Lord Justice Millet

---

[442] FED. CONST. MALAY. art. 161A.

[443] *Nor Anak Nyawai*, 6 MALAY. L.J. at 297. The judge was particularly annoyed because the defendant counsel had labeled the plaintiffs as prosperous because they were able to "travel down to Kuching and observe the court proceedings for the duration of the trial." This exemplified the "delusions" the defendants were laboring under in "equating someone as being prosperous just because he can make it down to Kuching from a longhouse. That attitude is of no surprise to me after all they have regarded providing a job that pays a sum near the poverty line as being very charitable to plaintiffs which they should not have refused." *Nor Anak Nyawai*, 6 MALAY. L.J. at 297.

[444] Malcomson Nicholas Hugh Bertram v. Naresh Kumar Mehta, 4 SING. L. REP. 454 (High Ct. 2001).

[445] Fine v. McLardy, Eng. & Wales C.A. 3003 (July 6, 1998) (unreported, transcript by Smith Bernal).

considered "it will not be long" before English judges were called upon to consider whether to grant injunctions to prevent harassment and stalking.[446] Judicial Commissioner Lee declared, "In my opinion, that time has come in Singapore,"[447] in effect adopting the rights-based approach advocated by Convention jurisprudence, as incorporated into England, to declare a privacy right and provide for a remedy.

F. To Identify a Lacunae and Bring it to Parliament's Attention

The Malaysian courts have extensively surveyed decisions from foreign jurisdictions like England, Australia, and Singapore[448] in relation to problems not directly addressed under its law. The case of *Wong Chiou Yong v. Pendafttar Besar / Ketua Pengarah Jabatan Pendaftaran Negara* [449] is illustrative.

The 1957 Births and Deaths Registration Act did not envisage the case of transsexuals wanting their sex to be altered in official documents after undergoing gender reassignment surgery.[450] The Act itself only allows for changes owing to clerical errors and provides no criteria for determining the sex of the person to be registered. The court, in facing an application for a declaration to recognize the changed sex of Wong, noted there was no law governing the registration of transsexuals and cautioned against conflicting with statutory intent. It recognized that were it to grant the application to change sex registration, it would usurp the role of Parliament, contrary to the separation of powers. Nevertheless, it expressed judicial sympathy. The court concluded, "The human and practical trend to accept the reality of gender reassignment would depart from the proper approach of construing the Births and Deaths Registration Act 1957 and the National Registration Act 1959."

The court stated that while cases from foreign jurisdictions may sometimes "assist the court in arriving at its decision,"[451] the value of Australian cases, for instance, was lessened as there was legislation providing for transsexuals to have their record of birth reflect their

---

[446] *Malcomson Nicholas Hugh Bertram*, 4 SING. L. REP. at 473 (quoting *Fine*, Eng. & Wales C.A. 3003).
[447] *Id.* at 474.
[448] Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163 (1998); Lim Ying v. Hiok Kian Ming Eric, 1 SING. L. REP. 184 (High Ct. 1992); Att'y Gen. for Commw. v. "Kevin & Jennifer" & Hum. Rts. & Equal Opportunity Comm'n (*The Cossey Case*) (2003) 30 Fam. L.R. 1 (Fam. Ct.) (Austl.).
[449] Wong Chiou Yong v. Pendafttar Besar / Ketua Pengarah Jabatan Pendaftaran Negara, 1 MALAY. L.J. 551 (Ipoh, High Ct. 2005).
[450] Births and Deaths Registration Act, 1957, ACT. NO. 299 (Malay.).
[451] *Wong Chiou Yong*, 1 MALAY. L.J. at 571.

reassigned sex. Foreign cases had to be read not in isolation but within each particular statutory context. Thus, case law from the Australian jurisdiction had to be distinguished and was not binding in the Malaysian jurisdiction because it has no specific legislation. The court noted the prudence of other courts that held they lacked jurisdiction to make declarations as to the sex of a transsexual at birth, as this was a matter for legislative decision.[452]

In declining the declaration "with regret," the Court expressed sympathy towards transsexuals who "cannot be left to live in legal limbo." It expressed the opinion that negative attitudes towards transsexuals based fundamentally on religious and moral views appeared to be slowly changing and that "judicial opinions in this area of the law is expected to be liberal" in service of the "best interests of society at large and the transsexuals."[453] Nevertheless, "the remedy for registration as to their current gender is with parliament and not the courts."[454] Nonetheless, in seeking to influence Parliament to act, it cited cases and academic articles that urged society to recognize the changed sex of post-operative transsexuals.[455] It noted that the sex of post-operative transsexuals "may raise serious issues of human rights but that is not a matter for this court to decide." This was a problem that "cannot be disregarded and require(s) legislation."[456]

G. To Expand Rights: "We have a Dynamic Written Constitution": Going "Global"

There have been occasions where Malaysian courts have been influenced by foreign cases to expand upon rights by broadly construing written constitutional liberties. For example, the right of access to justice has been declared to fall within Article 5(1) and thus to be integral to personal liberty.[457]

---

[452] *In re* T, [1975] 2 N.Z.L.R. 449 (Sup. Ct.); W v. W, 1976 (2) SALR 310 (S. Afr.).
[453] *Wong Chiou Yong*, 1 MALAY. L.J. at 574.
[454] *Id.* at 574-75.
[455] R. Green, *Transsexualism and Marriage*, 120 NEW L.J. 210 (1970); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
[456] *Wong Chiou Yong*, 1 MALAY. L.J. at 576.
[457] The Court of Appeal declared this in *Sugumar Balakrishnan v. Director of Immigration*, Sabah, 3 MALAY. L.J. 289 (Kuala Lumpur, C.A. 1998), to support the argument that Parliament could not enact ouster clauses to hinder the constitutional right of free access to an independent judiciary. The decision was reversed by the Federal Court but in terms that did not deny the existence of this constitutional right. The right was asserted again before the Court of Appeal in *Kekatong v. Danaharta Urus*, 3 MALAY. L.J. 1 (Kuala Lumpur, C.A. 2003), where the court argued that access to justice was a fundamental right under the equality clause, Article 8(1).

In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan*,[458] Court of Appeal Judge Gopal Sri Ram, in defining "life" in Article 5(1), found that this included a "right to livelihood." In so deciding, Judge Ram borrowed from U.S. sources that read the Due Process Clause in the Fourteenth Amendment as being designed to secure for individuals "the essential conditions for the pursuit of happiness," life thus went beyond "mere animal existence."[459] This approach was adopted in Indian case law, which equated reference to "life" in Article 21 as "the right to live with human dignity."[460] Drawing from the Directive Principles of State Policy, Judge Bhagwati declared that Article 21 protections

> ...must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State—neither, the central government nor any state government—has the right to take any action which will deprive a person of the enjoyment of these basic essentials.[461]

While acknowledging that the Malaysian Constitution lacked State Directives, Judge Ram inferred a commonality of values from a reading of government policy evident from "the copious and continuous stream of beneficial legislation" designed to "provide housing, water, electricity and communication systems to the far flung areas of our country."[462] Judge Ram, in advocating a broad and liberal construction of "life" in Article 5, drew inspiration from Indian jurisprudence but tried to anchor his construction in the local context by reasoning that "the courts should keep in tandem with the national ethos" when interpreting "a living document like the Federal Constitution" to avoid being passed by "the winds of

---

[458] Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan, 1 MALAY. L.J. 261 (Kuala Lumpur, C.A. 1996).

[459] Munn v. Illinois, 94 U.S. 113, 142 (1877) (Field, J., dissenting).

[460] Kharak Singh v. State of Uttar Pradesh, A.I.R. 1963 S.C. 1295 (India).

[461] Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 811-12 (India) (noting that Directive Principles were not justiciable but should be protected when entrenched in existing legislation).

[462] *Tan Tek Seng*, 1 MALAY. L.J. at 288.

modern and progressive change," so as not to be "blind to the realities of life" by wearing "blinkers" in interpreting the supreme law.[463]

However, Judge Ram cautioned that judges should take their cue from "national ethos" rather than impose judicial preferences, as discerned from the policies of the elected government.[464] While calling for a "progressive" spirit, Judge Ram insisted that this was the only way to "implement the true intention" of the constitutional framers.[465] The true intention may not have been this at all, and this appeal to originalism appears merely rhetorical. Thus, Judge Ram interpreted "life" broadly to include "all those facets that are an integral part of life itself and those matters which go to form the quality of life," including "the right to seek and be engaged in lawful and gainful employment" and the "right to live in a reasonably healthy and pollution free environment."[466] To buttress his approach, he cited two Indian Supreme Court cases, which asserted that Article 21(1) protected the right to livelihood and not merely guarded against the extinguishing of life—a life without livelihood would "not only denude life of its effective content and meaningfulness" but would "make life impossible to live."[467] Furthermore, as the right to livelihood was included in the constitutional right to life, this fundamental right could not be "consigned to the limbo of undefined premises and uncertain application" by making employment contingent on "the fancies of individuals in authority."[468] Thus, Judge Ram determined that a public servant dismissed for criminal breach of trust had a right to make representations as an aspect of procedural fairness,[469] as a "product" of the "combined effect" of Article 8(1) (equality) and Article 5(1) (liberty and life) of the Malaysian Constitution.[470] In another case, the court determined that the right to livelihood was also infringed where aboriginal lands were expropriated.[471]

In presenting an overview of "procedural fairness," Judge Ram noted that the American Due Process Clause had influenced the development of procedural fairness as integral to administrative decision-making in England, a development that took place "without the distinct advantage of a supreme law contained in a written constitution."[472] Judge Ram considered that it was "wholly unnecessary" for Malaysian courts to

---

[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] Olga Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180, 193 (India).
[468] Delhi Transport Corp. v. D.T.C. Mazdoor Cong., (1991) Suppl. 1 S.C.C. 600, 717 (India).
[469] *Tan Tek Seng*, 1 MALAY. L.J. at 289.
[470] *Id.* at 298.
[471] Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY. L.J. 241, 266 (Kuching, High Ct. 2001).
[472] *Tan Tek Seng*, 1 MALAY. L.J. at 281.

draw inspiration from English sources on this subject, though their decisions might provide "useful assistance." He stressed that "we have a dynamic written constitution" to which resort must be had in "our primary duty to resolve issues of public law." He considered that "law" within Article 5(1) and Article 8 related to "both substantive law and procedure under enacted law."[473]

Judge Ram stated that the constitutionality of state action that infringes on a fundamental right, whether the action be legislative or administrative, is to be assessed by the substantive test the Supreme Court applied in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh*,[474] which examined whether the fundamental right was directly affected by state action or whether its inevitable consequence was to make the exercise of the right illusory and ineffective. This was inspired by the Indian Supreme Court in *Maneka Gandhi v. Union of India*. Judge Gopal noted that the Article 14(1) equality clause of the Indian Constitution was *in pari materia* with Article 8(1) of the Malaysian Constitution.[475] Article 14(1) was not to be subjected to a "narrow, pedantic or lexicographic approach" but to be construed with the broadest amplitude, to have regard to its "all-embracing scope" so as not to do violence to its "activist magnitude."[476] Equality, which was "sworn enemies" with arbitrariness, was a "dynamic concept" not to be imprisoned "within traditional and doctrinaire limits."[477] When the procedure in Article 21 regulating the deprivation of life or liberty was read with Article 14, it had to "answer the test of reasonableness" or be invalid if "arbitrary, fanciful or oppressive."[478]

Judge Ram noted that the approach towards equality issues in *Maneka Gandhi* represented a departure from the prior test of "reasonableness classification,"[479] which Malaysian courts had followed. In justifying the adoption of the *Maneka Gandhi* test, Judge Ram said that flowing from the precedential authority of *Nordin bin Salleh*, it was "not open to me to ignore the new approach" in construing Article 8(1) of the Malaysian Constitution both "on principle and authority" to "stubbornly cling on to an archaic and arcane approach."[480] The principle of equality as part of the rule of law in the Indian Republic applied "with equal

---

[473] *Id.* at 283.
[474] Dewan Undangan Negeri Kelantan v. Nordin bin Salleh, 1 MALAY. L.J. 697 (1922).
[475] *Tan Tek Seng*, 1 MALAY. L.J. at 283.
[476] *Id.* at 284 (citing Maneka Gandhi v. Union of India A.I.R. 1978 S.C. 597 (India)).
[477] *Id.*
[478] *Id.*
[479] *Id.* at 284 (quoting Datuk Hj Harun bin Hj Idris v. Pub. Prosecutor, 2 MALAY. L.J. 155 (1977) (establishing "reasonableness classification" test)).
[480] *Tan Tek Seng*, 1 MALAY. L.J. at 285.

force" to Article 8(1) within a system of constitutional monarchy, as a matter of shared constitutional principle.[481] This exemplifies the utility of transnational judicial conversations to bolster the strength of common constitutional principles.

V. CONCLUDING OBSERVATIONS: OF AMBIVALENCE AND EMBRACE

> *The beginning of wisdom is to understand that we all live in our own cultural box.*[482]
>
> —Singapore Ambassador-at-Large, Tommy Koh

> *...Comparative law may have been the hobby of yesterday. But it is destined to become the science of tomorrow. We must welcome, rather than fear its influence.*[483]
>
> —Lord Goff of Chieveley

The impact of globalization on civil liberties is greater within legal systems where the dominant mode of constitutional interpretation is that of the "living tree," the idea that societal values are evolving and that transnational law is an appropriate source to draw from in comprehending evolving standards of decency in a rights-expanding manner. This of course assumes that standards are evolving upwards, when the converse might be true. However, confronting different normative assumptions has the virtue of compelling judges to make more explicit the basis of their reasoning. Those who embrace this new transnational judicial conversation have an optimistic faith that in a multicultural world with different legal systems, political traditions, and moral and cultural values, the universalizing language of international and comparative human rights will continue its march towards the creation of a cosmopolitan community of values.

It is clear that both Malaysian and Singaporean courts, in construing similarly worded Bills of Rights, have at their disposal a wider pool of source material in the utilization of transnational sources in constructing judicial opinions, to serve a variety of purposes, including

---

[481] *Id.* at 290.

[482] THE LITTLE RED DOT: REFLECTIONS BY SINGAPORE'S DIPLOMATS (Tommy Koh & Chang Li Lin eds., 2005) (speaking of the need for a good negotiator to cultivate cultural intelligence), *summary available at* http://www.eastasianstudies.com/eastasian/5893_02.htm, *as quoted in* Vanessa Lee, *Icy seas and a little red dot: Singapore's diplomats tell their stories—some sleeping with revolvers under pillows*, TODAY, Aug. 31, 2005, at 15 (Sing.).

[483] *The Future of the Common Law*, 46 INT'L & COMP. L.Q. 745, 748 (1997).

the expanding of rights-based claims, and the contraction of rights through valorizing public order concerns. Their judgments are hardly insular, insofar as they are full of citations to transnational and international law. This has brought to the fore the constitutional relevance of foreign court decisions as persuasive authorities to help resolve constitutional ambiguities, to harmonize domestic with international standards, and to signal trends in the progressive development of the law. Both courts appear to hold the conscious desire not to appear to descend into the political thicket or be perceived as being politicized in developing expansive construction of rights, facilitated by transnational sources. These courts are unlikely to move along the lines of the heightened judicialization associated with some constitutional courts, which has raised the old bugbear of judicial review and the democratic deficit.

Where judges have treated transnational materials as a source of inspiration or persuasion, the motivation appears to be to bring about the progressive development of rights jurisprudence in the sense of balancing different constitutional values or interpreting broad principles. Where judges have engaged with foreign decisions but without being persuaded by their approaches, it appears that transnational sources are instrumentally utilized to buttress the existing status quo by promoting statist values.

There are thus twin strains of internationalism and nationalism evident in case law, with the Malaysian courts generally displaying a more expansive approach when it comes to using transnational sources as persuasive authority to define issues, formulate justifications, and to elaborate upon the scope and content of rights as claims against the state that limit state power, particularly in the field of indigenous peoples rights and in construing the "right to life." This entails an engagement by some judges in transnational judicial conversations beyond the four walls with the motive being to learn and draw from experiences abroad to do a better job at home. The broad assumptions here are that there are universalist values shared by a pacific international community, which may be drawn from and may in some cases strengthen and confirm judicial opinion and advance the development of the law by pointing out statutory deficiencies or gaps in the light of transnational standards.

In Singapore, the predominant judicial strain appears to be oriented towards deferentialism to state authorities. This attitude curbs an "adventurous" spirit and judicial creativity in constitutional construction, especially in the aftermath of *Chng Suan Tze v. Minister of Home Affairs*. Where transnational sources are engaged with strategically, as opposed to peremptorily dismissed, these are often either used to demonstrate a lack

of international consensus over the scope and content of a right or as cultural "anti-models" in service of the articulation of a "local conditions" jurisprudence that prioritizes statist or communal interests over individual rights. The virtue of engagement is that it provides the opportunity for a clearer identification of the tenets of a particular culturalist approach, where judges sufficiently develop this beyond mere rhetorical invocation, opening it to clearer scrutiny. This creates the anomaly of what might be called "a written bill of rights without a rights culture," which is the greatest inhibitor to fruitful constitutional cross-fertilization.

While it is clear that transnational sources are used selectively rather than systematically, it is also apparent that the Malaysian and Singaporean courts have long operated "beyond the four walls," even if just to use foreign decisions to buttress these four walls in the sense of solidifying particularist values, justifying these on their merits or by dispelling impressions of parochialism by demonstrating such values are applied elsewhere.