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3 October 2012

Shall the Twain Never Meet?
Competing Narratives and
Discourses of the Rule of Law in
Singapore

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SHALL THE TWAIN NEVER MEET? COMPETING NARRATIVES AND DISCOURSES OF THE RULE OF LAW IN SINGAPORE

JACK TSEN-TA LEE*

This article aims to assess the role played by the rule of law in discourse by critics of the Singapore Government's policies and in the Government's responses to such criticisms. It argues that in the past the two narratives clashed over conceptions of the rule of law, but there is now evidence of convergence of thinking as regards the need to protect human rights, though not necessarily as to how the balance between rights and other public interests should be struck. The article also examines why the rule of law must be regarded as a constitutional doctrine in Singapore, the legal implications of this fact, and how useful the doctrine is in fostering greater solicitude for human rights.

Singapore is lauded for having a legal system that is, on the whole, regarded as one of the best in the world,¹ and yet the Government is often vilified for breaching human rights and the rule of law. This is not a paradox—the nation ranks highly in surveys examining the effectiveness of its legal system in the context of economic competitiveness, but tends to score less well when it comes to protection of fundamental

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¹ See *e.g.*, Lydia Lim, "S'pore Submits Human Rights Report to UN" *The Straits Times* (26 February 2011):

On economic, social and cultural rights, the report [by the Government for Singapore's Universal Periodic Review] lays out Singapore's approach and achievements, and cites glowing reviews by leading global bodies. These include the World Economic Forum and the International Institute for Management Development's ranking of Singapore's legal system as among the best in the world.

For details, see Klaus Schwab, ed., *The Global Competitiveness Report 2012–2013* (Geneva: World Economic Forum, 2012) at 11, 13, 14, 318 and 319, online: World Economic Forum <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf> (last accessed: 3 October 2012; archived at <<http://www.webcitation.org/6B7ewMk8k>>) (Singapore's overall ranking was 5.67 out of 7, second out of 144 economies); James Gwartney, Robert Lawson & Joshua Hall, *Economic Freedom of the World: 2012 Annual Report* (Vancouver, BC: Fraser Institute, 2012) at 10, 146, online: Fraser Institute <<http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/economic-freedom-of-the-world-2012.pdf>> (last accessed: 3 October 2012) (overall ranking of 8.69 out of 10 in 2010, second out of 144 countries surveyed); "The World Competitiveness Scoreboard 2012" in *IMD World Competitiveness Yearbook 2012* (Lausanne: International Institute for Management Development 2012) at 6, online: International Institute for Management Development <<http://www.imd.org/research/publications/wcy/upload/scoreboard.pdf>> (last accessed: 3 October 2012; archived at <<http://www.webcitation.org/6B7e6UmTF>>) (overall ranking of 95.923 out of 100, fourth out of 55 economies surveyed).

liberties.² The Government is unapologetic, and has publicly stated that its focus is the country's economic development and stability. It disagrees with the more liberal views on human rights espoused by critics, charging them with a lack of knowledge and sensitivity to the local culture and situation. It points to the fact that the electoral success of the ruling People's Action Party ("PAP") since 1959 constitutes voter endorsement of its policies. During this discourse, both sides have relied on the doctrine of the rule of law, the Government maintaining that it has complied fully with it, and critics arguing that the rule of law in Singapore "has given way to empty legalism" and is in "demise",³ or has been systematically "dismantle[d]"⁴ by the Government.⁵

This article aims to assess the role played by the rule of law in discourse by critics of the Government's policies and in the Government's responses to such criticisms. To set the scene, Part I justifies why the rule of law must be regarded as a doctrine embodied in the *Singapore Constitution*,⁶ and the legal implications of this fact. The first section of Part II then describes two series of incidents that have generated much of the criticism about the Government's adherence to the rule of law. These concern the use of the *Internal Security Act* ("ISA")⁷ to detain without trial persons deemed to pose a national security risk, and the bringing of defamation suits by members of the Cabinet and the PAP against opposition politicians. Rather than attempting to examine the correctness of the positions taken by either the critics or the Government, in the second section of Part II of the article I identify the conceptions of the rule of law adopted and consider if there is any congruence between them. I conclude in Part III with some thoughts on whether present conditions are conducive to the Government and its critics starting to work towards consensus on the extent to which Singapore law should respect human rights standards, and the utility of the rule of law doctrine in this regard.

I. UNDERSTANDINGS OF THE RULE OF LAW

A. *The Rule of Law as a Constitutional Principle*

The rule of law doctrine is not merely a legal principle but a constitutional one. This has been recognized in the context of the United Kingdom's unwritten constitution, as

² For instance, the World Press Freedom Index 2012 ranked Singapore 135 out of 179 countries: *World Press Freedom Index 2012* (Paris: Reporters Without Borders, 2012), online: Reporters Without Borders <http://en.rsf.org/IMG/CLASSEMENT_2012/CLASSEMENT_ANG.pdf> (last accessed: 3 October 2012; archived at <<http://www.webcitation.org/6B7grecq8>>).

³ Beatrice S. Frank *et al.*, *The Decline in the Rule of Law in Singapore and Malaysia: A Report of the Committee on International Human Rights of The Association of the Bar of the City of New York* (New York: The Association of the Bar of the City of New York, 1990) at 46 [*Decline in the Rule of Law*]. The portion of the report dealing with Singapore was also published as "Decline of the Rule of Law in Malaysia and Singapore Part II—Singapore" (1991) 46 *The Record of the Association of the Bar of the City of New York* 7.

⁴ Asia Watch, *Silencing All Critics: Human Rights Violations in Singapore* (New York: Asia Watch, 1989) at 1.

⁵ Li-ann Thio, "Rex Lex or Lex Rex? Competing Conceptions of the Rule of Law in Singapore" (2002) 20 *UCLA Pac. Basin L.J.* 1 at 6 [Thio, "Rex Lex or Lex Rex?"].

⁶ *Constitution of the Republic of Singapore* (1999 Rev. Ed. Sing.) [*Singapore Constitution*].

⁷ Cap. 143, 1985 Rev. Ed. Sing. [*ISA*].

well as in constitutional texts such as the *Canadian Charter of Rights and Freedoms*.⁸ In *Fitzpatrick v. Sterling Housing Association*,⁹ a decision of the Court of Appeal of England and Wales, Ward L.J. said that he was “entitled to presume that Parliament always intends to conform to the rule of law as a constitutional principle”;¹⁰ and in *Re Manitoba Language Rights*¹¹ the Supreme Court of Canada stated that the rule of law was “a fundamental principle of our Constitution”.¹² The preamble to the *Charter* specifies that “Canada is founded upon principles that recognize the supremacy of God and the rule of law”, but over and above this, the Court held:¹³

[T]he [rule of law] principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

Thio Li-ann has expressed the view that although the rule of law is not mentioned in the *Singapore Constitution*, “it has through practice entered Singapore’s constitutional and political lexicon”.¹⁴ There is, in fact, a strong basis for the constitutional status of the rule of law in Singapore. *Re Manitoba Language Rights* noted that the rule of law “has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest”.¹⁵ The backbone of Singapore’s Constitution is formed by the *Constitution of the State of Singapore*¹⁶ that the nation possessed when it was part of the Federation of Malaysia, supplemented with provisions of the *Federal Constitution* upon Singapore’s full independence in 1965.¹⁷ In the words of the Privy Council in *Hinds v. The Queen*,¹⁸ such written constitutions granted by the United Kingdom to her former

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter of Rights and Freedoms*].

⁹ [1998] Ch. 304 (C.A.).

¹⁰ *Ibid.* at 337. See also Paul P. Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] P.L. 467 at 487: “[T]he rule of law is rightly regarded as a central principle of constitutional governance.”

¹¹ [1985] 1 S.C.R. 721 (S.C.).

¹² *Ibid.* at para. 59. See also *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 (S.C.), at para. 32 (the paragraph references are to the Westlaw version of the case report).

¹³ *Re Manitoba Language Rights*, *supra* note 11 at para. 68.

¹⁴ Thio, “*Rex Lex or Lex Rex?*”, *supra* note 5 at 1. In *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at para. 3.051, Thio states: “The text of the Singapore constitution is silent and contains no express provision on the rule of law; however it has been the subject of parliamentary debate and judicial affirmation.”

¹⁵ *Re Manitoba Language Rights*, *supra* note 11 at para. 67.

¹⁶ *The Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963* (S.I. 1963 No. 1493), published in the Subsidiary Legislation Supplement of the *State of Singapore Government Gazette* as Sp. No. S 1 of 1963. Following full independence, the State Constitution was amended by the *Constitution (Amendment) Act 1965* (No. 8 of 1965).

¹⁷ These were applied to Singapore by the *Republic of Singapore Independence Act 1965* (No. 9 of 1965, 1985 Rev. Ed. Sing.), s. 6.

¹⁸ [1977] A.C. 195 (P.C.) (on appeal from Jamaica).

colonies were “negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law”, and “[t]he new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary”.¹⁹ Thus, in *Jeyaretnam Joshua Benjamin v. Attorney-General*,²⁰ the High Court was able to say that “the Constitution is based essentially on the Westminster model and adopts and codifies most, if not all, of the laws, customs, conventions and practices of the British constitutional and parliamentary system”.²¹ It was on such grounds that the High Court held, in the 2012 case of *Mohammad Faizal bin Sabtu v. Public Prosecutor*,²² that the doctrine of the separation of powers was embodied in the *Singapore Constitution*. The same must be true of the rule of law.

Furthermore, the text of the *Constitution* reflects the rule of law principle. Constitutionalism is the idea that a government is limited by what the constitution of the state requires and cannot simply act as it pleases. To ensure compliance, the *Singapore Constitution* declares its own status as fundamental law and empowers the courts to examine the compatibility of executive and legislative acts with its terms by means of judicial review. In *Tan Eng Hong v. Attorney-General*,²³ the Court of Appeal stated:²⁴

The supremacy of the Constitution is necessary for the purposes of the Constitution to be protected as it ensures that the institutions created by the Constitution are governed by the rule of law, and that the fundamental liberties under the Constitution are guaranteed.

The courts’ judicial review role is emphasized by art. 4 and 162 of the *Constitution*. Article 4 declares the *Constitution* to be “the supreme law of the Republic of Singapore”, and thus “any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void”. Article 162 states that laws which existed at the time of the *Constitution*’s commencement on 9 August 1965²⁵ “continue in force on and after the commencement of this Constitution”, but must be “construed... with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution”. The wording of art. 162 suggests that the courts are not empowered by this provision to entirely invalidate laws existing at the time of the *Constitution*’s commencement. Nonetheless, in *Tan Eng Hong* the Court of Appeal took the view that a purposive reading of art. 4 and 162 indicates that such laws can be declared void under art. 4.²⁶

Though the *Constitution* is silent on which branch of government is responsible for giving effect to art. 4 and 162, the High Court has asserted in *Chan Hiang Leng*

¹⁹ *Ibid.* at 212.

²⁰ [1987] S.L.R.(R.) 472 (H.C.).

²¹ *Ibid.* at para. 9.

²² [2012] 4 S.L.R. 947 at paras. 11–13 (H.C.) [*Mohammad Faizal bin Sabtu*].

²³ [2012] 4 S.L.R. 476 (C.A.) [*Tan Eng Hong*].

²⁴ *Ibid.* at para. 60.

²⁵ *Singapore Constitution*, *supra* note 6, art. 2(1): “‘commencement’, used with reference to this Constitution, means 9th August 1965”.

²⁶ *Tan Eng Hong*, *supra* note 23 at paras. 59–61.

*Colin v. Public Prosecutor*²⁷ that it is the court's task to do so:²⁸

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

In *Public Prosecutor v. Taw Cheng Kong*²⁹ the Court of Appeal explicitly drew a link between the courts' judicial review role and the rule of law: "The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land."³⁰ These expressions of the courts' role are in line with the reasoning employed in the landmark case *Marbury v. Madison*.³¹ In *Marbury* the Supreme Court of the United States said it was clear that the duty of securing observance of the Constitution by the political branches of government falls upon the courts as this is an aspect of judicial power; the same is true in Singapore since the *Constitution* vests the judicial power of Singapore solely in the courts.³² Part VIII of the *Constitution* contains various provisions that seek to safeguard the independence of the Supreme Court judiciary, which is primarily responsible for carrying out judicial review. The effectiveness of constitutional judicial review by the courts is thus assured by the principle of separation of powers, which the High Court characterized in *Mohammad Faizal bin Sabtu*³³ as "part of the basic structure of the Singapore Constitution".³⁴

It is submitted that the court's assertion of a jurisdiction to subject executive action and legislation to judicial review for compliance with the *Constitution* reinforces the fact that the rule of law doctrine underlies the constitutional order in Singapore. For the sake of completeness, it should be noted that the latter fact is also buttressed by the High Court's exercise of judicial review in administrative law. As Simon Brown J. stated in *R v. Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex parte Vijayatunga*:³⁵ "Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law".³⁶

²⁷ [1994] 3 S.L.R.(R.) 209 (H.C.).

²⁸ *Ibid.* at para. 50, citing Harry Gibbs, "The Court as Guardian of the Constitution: The Basic Principle" in Mohamed Salleh Abas & Visu Sinnadurai, eds., *Law, Justice and the Judiciary: Transnational Trends* (Kuala Lumpur: Professional Law Book Publishers, 1998) at 51–66. This passage was also mentioned in *Taw Cheng Kong v. Public Prosecutor* [1998] 1 S.L.R.(R.) 78 at para. 14 (H.C.) [*Taw Cheng Kong* (H.C.)]; and see *Mohammad Faizal bin Sabtu*, *supra* note 22 at para. 14: "Singapore's Westminster model is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void."

²⁹ [1998] 2 S.L.R.(R.) 489 (C.A.) [*Taw Cheng Kong* (C.A.)].

³⁰ *Ibid.* at para. 89.

³¹ 5 U.S. (1 Cranch) 137 (1803) at 176–178 [*Marbury*].

³² *Singapore Constitution*, *supra* note 6, art. 93.

³³ *Supra* note 22.

³⁴ *Ibid.* at para. 11.

³⁵ [1988] Q.B. 322 (H.C.).

³⁶ *Ibid.* at 343, cited in *R (Cart) v. Upper Tribunal* [2011] Q.B. 120 at para. 34 (C.A.).

The fact that the rule of law is a constitutional principle is significant because the Prime Minister and other Cabinet ministers, Members of Parliament, and judges are bound to “preserve, protect and defend” the *Constitution*.³⁷ Ordinary legislation and common law rules that are incompatible with the principle must also yield to it. In *Chng Suan Tze v. Minister for Home Affairs*³⁸ the Court of Appeal expressed the *obiter* view that exercises of discretion by the President and the Home Affairs Minister relating to detentions without trial under the *ISA* should be assessed by the court objectively rather than from the subjective point of view of these persons since, among other things, “the notion of a subjective or unfettered discretion is contrary to the rule of law”.³⁹ The Court thus declined to follow the earlier decision *Lee Mau Seng v. Minister for Home Affairs*,⁴⁰ in which the High Court had applied a subjective test. These cases are discussed in more detail below. While the Court of Appeal did not specifically identify the rule of law as a constitutional doctrine, the case illustrates how a court might utilize the doctrine to invalidate an existing legal rule.

Furthermore, the doctrine empowers courts to grant suitable remedies in constitutional law cases. It was relied on, for instance, in *Re Manitoba Language Rights*,⁴¹ which involved a highly unusual set of facts. The province of Manitoba’s constitution, the *Manitoba Act, 1870*⁴² (which is deemed to be part of the *Constitution of Canada*),⁴³ requires that all statutes be enacted in both English and French. However, in 1890, the province passed the *Official Language Act*⁴⁴ which specified that, henceforth, statutes only had to be enacted in English. Two county court decisions held this Act to be unconstitutional, but they were neither appealed nor even reported, and were ignored by the provincial government. Subsequently, in 1979 another case⁴⁵ reached the Supreme Court of Canada, which confirmed that the *Official Language Act* was void. The provincial government then began translating and re-enacting all statutes passed since 1890. Before it could finish the task, a motorist who had been charged with speeding argued that the charge could not stand because the statute creating the offence was invalid, not having been enacted in French. The Manitoba courts rejected the defence,⁴⁶ but when the case was appealed to the Supreme Court, the Federal Government referred the matter to the Court for an advisory opinion on the validity of all statutes of Manitoba that had been enacted only in English.⁴⁷

³⁷ *Singapore Constitution*, *supra* note 6, art. 27, 61 and 97, and Forms 2, 3, and 6 of the *First Schedule*.

³⁸ [1988] 2 S.L.R.(R.) 525 (C.A.) [*Chng Suan Tze*].

³⁹ *Chng Suan Tze*, *ibid.* at para. 86, cited in *Lim Teng Ee Joyce v. Singapore Medical Council* [2005] 3 S.L.R.(R.) 709 at para. 15 (H.C.); *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R. (R.) 239 at para. 149 (C.A.); *Yong Vui Kong v. Attorney-General* [2011] 2 S.L.R. 1189 at para. 78 (C.A.); and *Ramalingam Ravinthran v. Attorney-General* [2012] 2 S.L.R. 49 at para. 17 (C.A.).

⁴⁰ [1971–1973] S.L.R.(R.) 135 (H.C.) [*Lee Mau Seng*].

⁴¹ *Supra* note 11.

⁴² Originally (U.K.) 1870 (33 Vict.), c. 3.

⁴³ *Constitution Act, 1982*, s. 52(2)(b), Sch. Item 2, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴⁴ *Official Language Act, 1890*, c. 14.

⁴⁵ *Attorney General of Manitoba v. Forest* [1979] 2 S.C.R. 1032 (S.C.).

⁴⁶ *Bilodeau v. Attorney General of Manitoba* [1981] 5 W.W.R. 393 (C.A.).

⁴⁷ Peter W. Hogg, “Necessity in a Constitutional Crisis: The Manitoba Language Rights Reference” (1989) 15 *Monash U.L. Rev.* 253 at 253, 254.

The Supreme Court affirmed the unconstitutionality of the *Official Language Act* and held that all statutes that had not been enacted in both English and French were invalid. This conclusion had the devastating consequence of creating a “legal vacuum”⁴⁸ in Manitoba. The view has been taken that the vacuum could never be filled because purported changes to the structure of the provincial legislature and to voting rights since 1890 meant that the legislature itself was invalid and could not enact remedial legislation. Neither was an amendment to the *Canadian Constitution* possible, because s. 43 of the *Constitution Act, 1982*⁴⁹ requires an amendment not applicable to all provinces to be “authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies”. If the Manitoba legislature itself was invalid, it could not pass any such resolution.⁵⁰

However, the Court also held that since the constitutional guarantee of the rule of law would not tolerate Manitoba lacking a valid and effectual legal system for the present and the future, the doctrine empowered the Court to deem the improperly enacted statutes of the province “temporarily valid and effective... for the period of time during which it would be impossible for the Manitoba legislature to fulfil its constitutional duty” of re-enacting and publishing these statutes in accordance with the Manitoba constitution’s terms.⁵¹

B. *What the Rule of Law Entails*

The Supreme Court of Canada reached the result mentioned above by relying on the principle that, arguably at the most fundamental level, the rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”.⁵² The Court was entitled to apply the novel remedy of granting temporary validity to invalid laws because the rule of law could not countenance a situation where a polity is effectively left ungoverned by law.

More familiar, perhaps, is the characterization of the rule of law as a doctrine holding that the state and its officials may only act in accordance with the law, and may not ignore its strictures.⁵³ One is immediately confronted with the question of what the term ‘law’ entails. In his seminal 2004 work, *On the Rule of Law: History, Politics, Theory*,⁵⁴ Brian Tamanaha explains that there are two different senses at play here. The first is that ‘law’ simply refers to the body of valid laws—both legislation and common law rules—that is currently in force. The state is required

⁴⁸ *Re Manitoba Language Rights*, *supra* note 11 at para. 59.

⁴⁹ *Supra* note 8.

⁵⁰ Hogg, *supra* note 47 at 255.

⁵¹ *Re Manitoba Language Rights*, *supra* note 11 at para. 89; see also Hogg, *ibid.* at 256, 257.

⁵² *Re Manitoba Language Rights*, *ibid.* at para. 64.

⁵³ See e.g., *Re Manitoba Language Rights*, *ibid.* at para. 63: “[T]he law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.”; Thio, “*Rex Lex or Lex Rex?*”, *supra* note 5 at 1, 2: “In opposing political absolutism, it [the rule of law] avers that no man is above the law and the law’s supremacy (*lex rex*) in contradistinction to the rule of man (*rex lex*).”; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) c. 9 at 114.

⁵⁴ Tamanaha, *ibid.*

to comply with it, but is not barred from changing it. The second sense is that ‘law’ also embodies constraints on the power of lawmakers to change the law.⁵⁵

However, differences of opinion exist as to the nature of these constraints. In this article, I adopt the typology of theories of the rule of law identified by Tamanaha. He notes that the rule of law may be categorized into formal versions and substantive versions, and describes them in this manner: “[F]ormal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle).” However, there is some overlap—“the formal versions have substantive implications and the substantive versions incorporate formal requirements”.⁵⁶

Within the formal and substantive versions, ‘thinner’ and ‘thicker’ formulations of the rule of law may be identified. At the thin end of formal versions of the rule is the idea of ‘rule by law’, which simply requires that governments act only on the basis of laws but says nothing about the standards that such laws ought to comply with. Rule by law imposes few, if any, constraints on governments, and Tamanaha notes that “no Western legal theorist identifies the rule of law entirely in terms of rule *by* law”.⁵⁷ Moving along the sliding scale, formal legality requires laws to satisfy certain minimum requirements in order to be regarded as compliant with the rule of law. This conception of the thin rule of law is often associated with the writings of Joseph Raz,⁵⁸ who theorized that the doctrine requires laws to be prospective, general, clear, public and relatively stable, and enforceable by an independent judiciary in open and fair hearings.⁵⁹ Finally, the thickest version of the formal conception of the rule of law adds to formal legality the requirement that the legal system must be one that embraces democracy, in the sense that laws are enacted by legislators who have been freely chosen by the people.⁶⁰

Where substantive theories of the rule of law are concerned, the thin version requires the elements of the formal conception to be satisfied, along with compliance with individual rights. Ronald Dworkin, for example, defines what he terms the ‘rights conception’ of the rule of law as follows:⁶¹

It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights.

⁵⁵ Compare Tamanaha, *ibid.* at 115.

⁵⁶ Tamanaha, *ibid.*, c.7 at 92.

⁵⁷ *Ibid.*

⁵⁸ Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 *Law Q. Rev.* 195.

⁵⁹ Tamanaha, *supra* note 53, c. 7 at 93.

⁶⁰ *Ibid.* at 99, 100.

⁶¹ Ronald Dworkin, “Political Judges and the Rule of Law” (1978) 64 *Proceedings of the British Academy* 259 at 262 [emphasis in original], cited in Tamanaha, *supra* note 53, c. 8 at 102.

Dworkin recognized one of the main difficulties of a substantive conception of the rule of law: there are often differences of opinion over the moral rights that people possess.⁶² Though Dworkin took the view that a controlling principle is usually evident, Tamanaha is more sceptical:⁶³

There is no uncontroversial way to determine what these [*i.e.*, individual] rights entail. All general ideals—like equality, liberty, privacy, the right to property, the freedom of contract, freedom from cruel punishment—are contestable in meaning and reach. In particular contexts of application conflicts between rights can arise. And no right is absolute, so consideration of social interests must always be involved, which cannot be answered through consideration of the right alone.

Another difficulty is that if we assume—as Dworkin does—that the resolution of the issue stated in the preceding paragraph should be dealt with in the judicial rather than the political arena, this may have anti-democratic implications.⁶⁴

A version of a substantive conception of the rule of law that is of intermediate thickness requires formal legality, individual rights and democracy to be upheld. This theory of the rule of law is evident in the writings of T.R.S. Allan, who has said that the rule of law not only “encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed”, but is also “inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all adult citizens in the legislative process; universal suffrage may today be taken to be a central strand of the rule of law.”⁶⁵

The thickest form of the substantive theory of the rule of law requires recognition of all the elements of the intermediate version, plus social welfare rights. Thus, if this form of the rule of law is accepted, the government has an affirmative duty to ensure distributive justice for the people. Tamanaha expresses the opinion that this version of the rule of law causes “severe difficulties”. As with individual rights, views as to what social welfare rights are may differ, and clashes between individual rights and social welfare rights may arise. The rule of law becomes a “proxy battleground for a dispute about broader societal issues, detracting from a fuller consideration of those issues on their own terms, and in the process emptying the rule of law of any distinctive meaning”.⁶⁶

Pinning down the most appropriate meaning of the rule of law is difficult, but it is a necessary task. First, as noted earlier, the courts may be called upon to determine whether executive and legislative acts comply with the doctrine, or may need, of their own accord, to base their reasoning on the doctrine. They cannot do so unless they articulate what the doctrine means. Secondly, the government and its critics often

⁶² Dworkin, *ibid.* at 263, 264.

⁶³ Tamanaha, *supra* note 53, c. 8 at 103, 104.

⁶⁴ *Ibid.* at 104–110.

⁶⁵ T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1993) at 21, 22, cited in Tamanaha, *ibid.* at 110, 111.

⁶⁶ Tamanaha, *ibid.* at 112, 113.

rely upon the rule of law in aid of the positions they take on government policies and statutes. No profitable dialogue can take place unless there is some agreement on the implications of the doctrine.

II. RULE OF LAW DISCOURSE IN SINGAPORE

Bearing in mind the typology of possible meanings of the rule of law described above, this part of the article considers how critics have employed the doctrine in support of their arguments, and attempts to identify the conception or conceptions of the rule of law adopted. To set the context, we begin with a narration of some key incidents that have led to some government policies being criticized from within and without the country.

A. Incidents Giving Rise to Criticism

1. *Detentions Under the Internal Security Act*

Two series of incidents in Singapore give rise to many of the allegations that the Government of Singapore has acted in breach of the rule of law. The first relates to detentions made by the Government under the *Internal Security Act*,⁶⁷ and the second to decisions by various Cabinet ministers and PAP Members of Parliament (“MPs”) to sue opposition politicians for defamation.

On 21 May 1987, 15 persons were arrested by the Internal Security Department of the Ministry of Home Affairs during Operation Spectrum. In particular, in June and July 1987 four of the arrested persons—Chng Suan Tze, Kevin de Souza, Teo Soh Lung and Wong Souk Yee—were served with detention orders pursuant to s. 8(1) of the *ISA*.⁶⁸ This provision states that “[i]f the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so”, the Minister shall make an order, among other things, directing that the person be detained for any period not exceeding two years. The statement setting out the grounds of detention which was served on one of the detainees, Teo Soh Lung, gives a flavour of the allegations against them. It says that she had been detained for acting “in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state”.⁶⁹ Subsequently,

⁶⁷ *ISA*, *supra* note 7.

⁶⁸ *Chng Suan Tze*, *supra* note 38 at paras. 2, 3. These four detainees are significant as they were the appellants in this landmark court case.

⁶⁹ *Ibid.* at para. 4. An academic and a number of the former detainees have disputed the Government’s grounds for detention: see Michael D. Barr, “Marxists in Singapore? Lee Kuan Yew’s Campaign against Catholic Social Justice Activists in the 1980s” (2010) 42:3 *Critical Asian Studies* 335; Teo Soh Lung, *Beyond the Blue Gate: Recollections of a Political Prisoner* (Petaling Jaya, Selangor: Strategic Information and Research Development Centre, 2010); Fong Hoe Fang, ed., *That We May Dream Again*, 2nd ed. (Singapore: Ethos Books, 2012); Teo Soh Lung & Low Yit Leng, eds., *Escape from the Lion’s Paw: Reflections of Singapore’s Political Exiles* (Singapore: Function 8, 2012); Tan Wah Piow, *Smokescreens & Mirrors: Tracing the “Marxist Conspiracy”* (Singapore: Function 8, 2012).

on 26 September 1987, the Minister for Home Affairs exercised powers granted to him by s. 10(1) of the *ISA*⁷⁰ to suspend the detention orders against Chng, de Souza, Teo, Wong and three other detainees since he was “satisfied that they are unlikely to resume subversive activities and no longer pose a security threat”. The detainees were required to execute bonds and to comply with three conditions: they were not to travel outside Singapore, take up membership in any society, or be involved in activities propagating Communism or Marxism.⁷¹

However, about seven months later on 18 April 1988, Chng, de Souza, Teo, Wong and five more detainees issued a joint media statement denying they were Marxist conspirators. In addition they claimed that, among other things, statements they had given to the authorities while detained had been induced by threats, and that they had been ill-treated and even tortured. The Home Affairs Minister responded the next day by revoking the suspension orders and rearresting eight of the signatories to the joint statement. (The remaining signatory had left Singapore.)⁷² The periods of detention of Chng, de Souza, Teo and Wong were later extended.⁷³ Having unsuccessfully challenged the legality of their detention by way of *habeas corpus* before the High Court, the four appealed to the Court of Appeal.

In *Chng Suan Tze v. Minister for Home Affairs*,⁷⁴ the Court of Appeal found in favour of the appellants on a narrow point. It held that the Government had not provided sufficient evidence of the President’s satisfaction that detention of the appellants was necessary to prevent them from acting in a manner prejudicial to national security. The formal recitals in the detention orders expressing the President’s satisfaction were insufficient as they amounted to hearsay; the orders had been signed by the Permanent Secretary to the Ministry of Home Affairs. The court could only presume the existence of the President’s satisfaction, applying the doctrine *omnia esse rite acta* (i.e., everything is presumed to have been correctly performed unless the contrary is shown), if there was evidence that the Cabinet or the Home Affairs Minister was satisfied that the appellants posed a threat to national security, and that the President was similarly satisfied after having been advised on the matter by Cabinet or the Minister. Such evidence had to originate from Cabinet itself, the Secretary to the Cabinet, or the Minister. For the same reason, an affidavit from the Permanent Secretary stating that the “government” was satisfied was insufficient evidence of the President’s satisfaction.⁷⁵

⁷⁰ *ISA*, *supra* note 7, s. 10(1): “At any time after an order has been made in respect of any person under section 8(1)(a) the Minister may direct that the operation of such order be suspended subject to the execution of a bond and to such conditions... as the Minister sees fit; and the Minister may revoke any such direction if he is satisfied that the person against whom the order was made has failed to observe any condition so imposed or that it is necessary in the public interest that such direction should be revoked.”

⁷¹ *Chng Suan Tze*, *supra* note 38 at para. 15.

⁷² *Ibid.* at paras. 16, 17.

⁷³ *Ibid.* at para. 23.

⁷⁴ *Supra* note 38. For commentary on this case, see Michael F. Rutter, “The Future for the Common Law” in *The Applicable Law in Singapore and Malaysia* (Singapore: Malayan Law Journal, 1989) 574 at 588–611; Sin Boon Ann, “Judges and Administrative Discretion: A Look at *Chng Suan Tze v. Minister of Home Affairs*” [1989] 2 M.L.J. ci. See also H. F. Rawlings, “Habeas Corpus and Preventive Detention in Singapore and Malaysia” (1983) 25 Mal. L. Rev. 324; Tan Yock Lin, “Some Aspects of Executive Detention in Malaysia and Singapore” (1987) 29 Mal. L. Rev. 237.

⁷⁵ *Ibid.* paras. 31–42.

Chng Suan Tze is regarded as a landmark decision, though, for a lengthy *obiter dictum* about the reviewability of detentions under the *ISA*. In a decision dated 13 July 1971 entitled *Lee Mau Seng v. Minister for Home Affairs*,⁷⁶ Chief Justice Wee Chong Jin, sitting as a High Court judge, had held that the President's state of mind upon being advised by Cabinet on *ISA* detentions is a "purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention".⁷⁷ Wee C.J. relied upon the Malaysian Federal Court decision *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia*,⁷⁸ which had arrived at the same result with respect to the *Internal Security Act 1960* of Malaysia,⁷⁹ the relevant provisions of which are *in pari materia* with the *ISA*. *Karam Singh* had itself followed the majority decisions of the House of Lords in *Liversidge v. Anderson*⁸⁰ and *Greene v. Secretary of State for Home Affairs*.⁸¹ Further, Wee C.J. held in *Lee Mau Seng* that the court could not even consider if the President had acted *mala fides*, that is:⁸²

[W]ithout exercising care, caution and a sense of responsibility and in a casual and cavalier manner or on vague, irrelevant or incorrect grounds and facts so that his subjective satisfaction with respect to the applicant was not "with a view to preventing the applicant from acting in any manner prejudicial to the security of Singapore, etc" but for a different purpose altogether.

This was because "the logical result... would be that a court can substitute its own [judgment] for the subjective satisfaction of the President acting in accordance with the advice of the Cabinet".⁸³

Delivering the Court of Appeal's judgment in *Chng Suan Tze* 17 years later, Wee C.J. reviewed case law developments since *Liversidge* and *Greene*, and noted that the House of Lords,⁸⁴ the Privy Council⁸⁵ and other Commonwealth courts⁸⁶ had determined that the majority decisions in those cases were wrong. Thus, the discretion of the President under the *ISA*, acting on Cabinet's advice, was not subjective as *Lee Mau Seng* had held. Rather, the court could conduct an objective review

⁷⁶ *Supra* note 40. For commentary on this case, see Rowena Daw, "Preventive Detention in Singapore—A Comment on *Lee Mau Seng*" (1972) 14 Mal. L. Rev. 276.

⁷⁷ Daw, *ibid.* at para. 54.

⁷⁸ [1969] 2 M.L.J. 129 (Malaysia F.C.), cited in *Lee Mau Seng, ibid.* at para. 53 [*Karam Singh*].

⁷⁹ No. 18 of 1960, now Act No. 82 (2006 Reprint).

⁸⁰ [1942] A.C. 206 (H.L.) [*Liversidge*].

⁸¹ [1942] A.C. 284 (H.L.) [*Greene*].

⁸² *Lee Mau Seng, supra* note 40 at para. 58.

⁸³ *Ibid.* at para. 60.

⁸⁴ *Inland Revenue Commissioners v. Rossminster Ltd* [1980] A.C. 952 at 1011, Lord Diplock, and at 1025, Lord Scarman, and *R. v. Secretary of State for the Home Department, ex parte Khawaja* [1984] A.C. 74 at 110, Lord Scarman, both cited in *Chng Suan Tze, supra* note 38 at paras. 61–63.

⁸⁵ *Nakkuda Ali v. M. F. de. S. Jayaratne* [1951] A.C. 66 (P.C.) (on appeal from Ceylon), *Attorney General of Saint Christopher, Nevis and Anguilla v. John Joseph Reynolds* [1980] A.C. 637 (P.C.) (on appeal from the West Indies Associated States), and *Teh Cheng Poh v. Public Prosecutor* [1980] A.C. 458 (P.C.) (on appeal from Malaysia), respectively cited in *Chng Suan Tze, supra* note 38 at paras. 60, 74–78, and 84, 85.

⁸⁶ For instance, *Minister of Home Affairs v. Austin* (1987) L.R.C. (Const.) 567 (Zimbabwe S.C.), and *Katofa v. Administrator-General for South West Africa* 1985 (4) S.A. 211 (South West Africa S.C.), cited in *Chng Suan Tze, supra* note 38 at paras. 71–73.

of the exercise of the discretion.⁸⁷ In addition, the Court of Appeal accepted the appellants' argument that the subjective test violated art. 12(1) and 93 of the *Constitution*. Article 12(1) guarantees to all persons the right to equality before the law and equal protection of the law, while art. 93 vests the judicial power of Singapore "in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force". The Court agreed that if the subjective test applied to ss. 8 and 10 of the *ISA* and prevented decisions made pursuant to these provisions from being reviewed by the court, they would be contrary to art. 12(1) which prohibits laws that are arbitrary.⁸⁸ Conversely, the objective test was consistent with both art. 12(1) and 93.⁸⁹ To date, *Chng Suan Tze* remains one of only two cases reported since Singapore's independence in 1965 in which a court has determined that statutory provisions contravene the *Constitution*.⁹⁰

Finally, as noted previously, the Court of Appeal relied upon the rule of law doctrine to support its opinion that the subjective test was incorrect in law. It said:⁹¹

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.

As an aside, it may be noted that the Court did not have to take a substantive view of the rule of law. It was sufficient for it to emphasize the point that the rule of law presupposes the existence of judicial review of primary and subsidiary legislation by an independent judiciary, which is a feature of a formal conception of the rule of law.⁹²

The Court's judgment in *Chng Suan Tze* was handed down on 8 December 1988. At about 4:40 pm that day, an order for Teo's release was served on the officer in charge of Whitley Road Centre where she was being detained. She was released at about 4:45 pm, placed in a car, driven a few hundred metres out of the gate, then served with a fresh detention order for the period 8 December 1988 to 19 June 1989 and rearrested.⁹³ She applied for *habeas corpus* five days later, on 13 December. Three days after that, the Government introduced two bills into Parliament seeking to amend the *Constitution* and to insert fresh provisions into the *ISA*. The bills were

⁸⁷ *Chng Suan Tze*, *supra* note 38 at paras. 70, 139 (sub-para (f)).

⁸⁸ *Chng Suan Tze*, *supra* note 38 at para. 82.

⁸⁹ *Ibid.* at para. 86.

⁹⁰ However, as the views expressed were *obiter dicta*, the Court of Appeal did not in fact declare the statutory provisions to be void. The other case was *Taw Cheng Kong* (H.C.), *supra* note 28, in which the High Court held that s. 37(1) of the *Prevention of Corruption Act* (Cap. 241, 1993 Rev. Ed. Sing.) discriminated against Singapore citizens and was thus incompatible with art. 12(1) of the *Constitution*. This ruling was reversed by the Court of Appeal in *Taw Cheng Kong* (C.A.), *supra* note 29, in an application for a criminal reference by the Public Prosecutor.

⁹¹ *Chng Suan Tze*, *supra* note 38 at para. 86.

⁹² See *e.g.*, *Raz*, *supra* note 58 at 200, 201.

⁹³ *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 S.L.R.(R.) 461 at para. 4 (H.C.) [*Teo Soh Lung* (H.C.)].

debated in Parliament on 25 January 1989 and passed on the same day.⁹⁴ The Act amending the *Constitution* came into force on 27 January,⁹⁵ and the *ISA* amendment Act on 30 January.⁹⁶

Four new provisions were added to the *ISA*. The operative provision was section 8B, which read as follows:

8B.— (1) Subject to the provisions of subsection (2), the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971; and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.

(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision.

Section 8B(1) sought to turn the clock back by freezing the law pertaining to judicial review of decisions made or actions taken under the *ISA* as at the date when *Lee Mau Seng* was decided by the High Court. For good measure, judicial review was excluded by the ouster clause in s. 8B(2). Section 8A was an interpretation section, while s. 8C removed the right to appeal to the Privy Council.⁹⁷ Section 8D made the other sections applicable to “any proceedings instituted by way of judicial review of any decision made or act done under the provisions of this Act, whether such proceedings have been instituted before or after the commencement” of the amending Act. The latter provision had the effect of retrospectively imposing the new *ISA* sections on Teo’s *habeas corpus* application made in December 1988.

The constitutional amendments related to art. 149, which is the provision authorizing the enactment of the *ISA*. Entitled “Legislation against subversion”, prior to the amendment, art. 149(1) stated that if an Act recited that “action has been taken or threatened by any substantial body of persons” for various purposes, including action “which is prejudicial to the security of Singapore”, then “any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with Article 9, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament”. The 1989 amendments added art. 11 and 12 to the list of fundamental liberties against which the *ISA* was immunized, modified the wording of art. 149(1), and tacked on a new art. 149(3) to protect ss. 8A to 8D

⁹⁴ *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 347 at para. 3 (C.A.) [*Teo Soh Lung* (C.A.)].

⁹⁵ *Constitution of the Republic of Singapore (Amendment) Act 1989* (No. 1 of 1989) (except for an amendment to art. 94(3) dealing with the appointment of judges, which was deemed to have come into effect on 19 November 1971).

⁹⁶ *Internal Security (Amendment) Act 1989* (No. 2 of 1989).

⁹⁷ Appeals to the Privy Council in all cases were eventually abolished in 1994 by the *Supreme Court of Judicature (Amendment) Act 1993* (No. 16 of 1993) (for commentary, see Tan Yock Lin, “Legislation Comment: Supreme Court of Judicature (Amendment) Act 1993” [1993] Sing J.L.S. 557), the *Constitution of the Republic of Singapore (Amendment) Act 1993* (No. 17 of 1993) and the *Judicial Committee (Repeal) Act 1994* (No. 2 of 1994).

of the *ISA*.⁹⁸ Like the amendments to the *ISA*, the constitutional amendments were intended to reverse the effect of *Chng Suan Tze*.

Teo unsuccessfully challenged the validity of the *ISA* amendments before the High Court and Court of Appeal.⁹⁹ Before the High Court, it was argued on Teo's behalf that the *ISA* amendments contravened the rule of law because they authorized arbitrary acts and decisions by the Government.¹⁰⁰ This submission was rejected, the Court taking the view that the amendments merely reaffirmed the legal position taken in *Lee Mau Seng*, and could not be regarded as "usurping judicial power or being contrary to the rule of law".¹⁰¹

There is no abrogation of judicial power. It is erroneous to contend that the rule of law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review or other actions. *Parliament has done no more than to enact the rule of law relating to the law applicable to judicial review.* The legislation does not direct the court to enter a particular judgment or dismiss a particular case. The court is left to deal with the case on the basis of the amendments. Legislation designed against subversion must necessarily include provisions to ensure the effectiveness of preventive detention. The amendments are intended to do just that.

The High Court thus appeared to adopt what Tamanaha calls 'rule by law', the thinnest form of the formal conception of the rule of law. Since Parliament had validly passed the 1989 amendments, the Court would not impugn the legislation for failing to

⁹⁸ The constitutional amendments extended the effect of art. 149(1) "to any amendment to that law [*i.e.*, a law enacted pursuant to art. 149(1)] or any provision in any law enacted under the provisions of clause (3)". Article 149(3) states:

If, in respect of any proceedings whether instituted before or after the commencement of this clause, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.

⁹⁹ *Teo Soh Lung* (H.C.), *supra* note 93; *Teo Soh Lung* (C.A.), *supra* note 94. Another detainee, Vincent Cheng, also made an application with a similar lack of success: *Cheng Vincent v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 38 (H.C.). For further commentary on the *Teo Soh Lung* cases, see Yee Chee Wai, Ho Tze Wei Monica & Seng Kiat Boon Daniel, "Judicial Review of Preventive Detention under the Internal Security Act—A Summary of Developments" (1989) 10 Sing. L. Rev. 66; Tham Chee Ho, "Judiciary under Siege?" (1992) 13 Sing. L. Rev. 60 at 73–83; Yeong Sien Seu, "Clarity or Controversy—The Meaning of Judicial Independence in Malaysia and Singapore" (1992) 13 Sing. L. Rev. 85 at 100–107; Michael Hor, "Terrorism and the Criminal Law: Singapore's Solution" [2002] Sing. J.L.S. 30; Michael Hor, "Law and Terror: Singapore Stories and Malaysian Dilemmas" in Victor V. Ramraj, Michael Hor & Kent Roach, eds., *Global Anti-terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 273; Michael Hor, "Constitutionalism and subversion: An exploration" in Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: Forty Years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009) 260; Eunice Chua, "Reactions to Indefinite Preventive Detention: An Analysis of how the Singapore, United Kingdom and American Judiciary Give Voice to the Law in the Face of (Counter) Terrorism" (2007) 25 Sing. L. Rev. 3; Yang Ziliang, "Preventive Detention as a Counter-terrorism Strategy: They Have Stopped Using It and So Should We" (2007) 25 Sing. L. Rev. 24; Thio Li-ann, "Constitutional Supremacy" in *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at paras. 04.084–04.104 [Thio, *Treatise*].

¹⁰⁰ *Teo Soh Lung* (H.C.), *supra* note 93 at para. 27.

¹⁰¹ *Ibid.* at para. 48 [emphasis added].

comply with other requirements often associated with the rule of law, such as effective judicial review or compliance with human rights standards. The Court of Appeal did not refer to the rule of law, but affirmed that it could not consider whether there were objective grounds for Teo's detention as Parliament had effectively reapplied the subjective test to the exercise of executive discretion under the *ISA*.¹⁰² Nonetheless, the Court left the door slightly ajar by suggesting that it has a responsibility to decide whether the President or Minister's satisfaction is in fact based on matters within the scope of ss. 8 and 10 of the *ISA*.¹⁰³

2. Defamation Suits Brought Against Opposition Politicians

The second series of incidents frequently relied upon as evidence that the Government fails to comply with the rule of law concern Cabinet members and other PAP MPs bringing defamation suits against opposition politicians. Such suits arguably have a chilling effect on political speech, particularly since they often relate to statements made during election campaigns, or concerning political issues.¹⁰⁴ Moreover, a successful suit that leads a large sum of damages being awarded to the plaintiff which the defendant cannot afford to pay can result in the defendant losing a parliamentary seat or being prevented from participating in elections. Under the *Constitution*, a person is not qualified to be an MP (or, as a matter of fact, to be elected as President) if he or she is an undischarged bankrupt,¹⁰⁵ and becoming bankrupt triggers the vacation of a parliamentary seat.¹⁰⁶

One of the earlier reported actions was taken by the then Prime Minister Lee Kuan Yew against Joshua Benjamin Jeyaretnam, the leader of the Workers' Party of Singapore ("WP"). It was claimed that during a rally for the 1976 general election, Jeyaretnam had insinuated that Lee had abused his office to obtain financial advantage for himself, his wife and his brother, and that he also lacked honesty and integrity and was thus unfit to hold the office of Prime Minister.¹⁰⁷ The High Court found in favour of the Prime Minister and awarded damages of \$130,000. The judgment

¹⁰² *Teo Soh Lung (C.A.)*, *supra* note 94 at paras. 19–21.

¹⁰³ "Lord Alexander's submission on the law as declared in *Lee Mau Seng* is thus an argument which is available to the appellant only if the evidence in fact demonstrates that she was redetained for purposes which had nothing to do with national security": *ibid.* at para. 27.

¹⁰⁴ For commentary, see Thio Li-ann, "Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society'" (2003) 1 Int'l. J. Const. L. 516; Tey Tsun Hang, "Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Impact on Political Speech" [2008] P.L. 452; Thio Li-ann, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore" [2008] Sing. J.L.S. 25; Cameron Sim, "The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law" (2011) 20 Pac. Rim L. & Pol'y J. 319; Thio Li-ann, "Freedom of Speech, Assembly and Association" in Thio, *Treatise*, *supra* note 99, 747 at paras. 14.128–14.192.

¹⁰⁵ *Singapore Constitution*, *supra* note 6, art. 45(1)(b), made applicable to the President by art. 19(2)(d).

¹⁰⁶ Article 46(2)(e) of the *Singapore Constitution* states that a MP's parliamentary seat becomes vacant "if he becomes subject to any of the disqualifications specified in Article 45". No corresponding provision applies to the President, who may only be removed from office in accordance with the procedure laid down by art. 22L for mental or physical infirmity, intentional violation of the *Singapore Constitution*, treason, misconduct or corruption involving the abuse of the powers of the office, or any offence involving fraud, dishonesty or moral turpitude.

¹⁰⁷ *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1979–1980] S.L.R.(R.) 24 at para. 20 (H.C.).

was upheld on appeal.¹⁰⁸ This signalled the start of a trend in which elections were characterized by defamation suits brought by candidates in respect of remarks made by their political opponents during the hustings.

Shortly before the Anson by-election of 1981, Jeyaretnam attended the inauguration of the Singapore Democratic Party (“SDP”) and delivered a speech. He was received rapturously by the audience, and when he had to leave early for another engagement a large number of people also left. Not long thereafter, the by-election was called and Jeyaretnam was nominated as the WP’s candidate. Goh Chok Tong, then the Minister for Defence and Second Minister for Health, and First Organizing Secretary of the PAP, gave a press conference at which he said that the “exodus” from the SDP inauguration had been “contrived” by Jeyaretnam “to show who is boss at this stage”.¹⁰⁹ Jeyaretnam sued Goh, contending that the remarks suggested that he was:¹¹⁰

[A]n opportunist, a man of base and dishonourable motives, seeking only to promote himself, to gain power for himself, and had shown by his conduct that he was not genuinely sincere in building up a credible and constructive opposition in Parliament but out solely to seek his own glory and was accordingly unfit to hold the office of a Member of Parliament.

The High Court found that although Goh’s words were defamatory, Jeyaretnam had failed to establish that he had been disparaged in his office as WP Secretary-General. Furthermore, Goh had made out a defence of fair comment. The holding was upheld on appeal to the Court of Appeal and the Privy Council.¹¹¹ Jeyaretnam was elected to Parliament for the Anson constituency in the 1981 by-election, breaking the PAP’s monopoly that had existed since 1968.

In the 1984 general election that followed, Seow Khee Leng, who was Secretary-General of the Singapore United Front, admitted to having defamed Lee Kuan Yew during a rally. Damages were assessed at \$250,000 for the “very serious slander” which had alleged corruption on the Prime Minister’s part.¹¹²

Jeyaretnam lost his parliamentary seat with effect from 10 November 1986¹¹³ following a conviction for having made a false declaration concerning the WP’s financial accounts, an offence under s. 199 of the *Penal Code*,¹¹⁴ for which a one-month imprisonment and a \$5,000 fine had been imposed.¹¹⁵ Under art. 45(1)(e) of the

¹⁰⁸ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1979–1980] S.L.R.(R.) 255 (C.A.).

¹⁰⁹ *Jeyaretnam Joshua Benjamin v. Goh Chok Tong* [1983–1984] S.L.R.(R.) 745 at para. 6 (H.C.).

¹¹⁰ *Ibid.* at para. 7.

¹¹¹ *Jeyaretnam Joshua Benjamin v. Goh Chok Tong* [1985–1986] S.L.R.(R.) 856 (C.A.), *aff’d* [1989] 2 S.L.R.(R.) 130 (P.C.).

¹¹² *Lee Kuan Yew v. Seow Khee Leng* [1988] 2 S.L.R.(R.) 252 at paras. 3, 41 (H.C.).

¹¹³ Sing., *Parliamentary Debates*, vol. 48, cols. 833, 834 (9 December 1986) (Yeoh Ghim Seng, Speaker).

¹¹⁴ Cap. 224, 1985 Rev. Ed. Sing. (now the 2008 Rev. Ed.).

¹¹⁵ Jeyaretnam and Wong Hong Toy, the Chairman of the WP, had been tried and convicted by a District Court and sentenced to three months’ imprisonment each. On appeal to the High Court, the sentences were initially reduced to an imprisonment term of one month and a fine of \$10,000 each (with a further jail term of one month in default of payment): *Wong Hong Toy v. Public Prosecutor* [1985–1986] S.L.R.(R.) 1049 at paras. 5, 53 (H.C.). However, when it was brought to the judge’s attention that at the time the appellants were convicted by the District Court it could only impose a fine of up to \$5,000, their fines were reduced to \$5,000 each: *Wong Hong Toy v. Public Prosecutor* [1987] S.L.R.(R.) 213 at paras. 6–8 (C.A.). The alteration of the fine was effected pursuant to the *Criminal Procedure Code*

Singapore Constitution, a person is not qualified to be an MP if he or she:

has been convicted of an offence by a court of law in Singapore or Malaysia and sentenced to imprisonment for a term of not less than one year or to a fine of not less than \$2,000 and has not received a free pardon.

Though the law provided no avenue for appealing the judgment to the Court of Appeal or the Privy Council, when Jeyaretnam appealed to the Judicial Committee his striking off from the roll of advocates and solicitors based on the false declaration conviction and a related 1985 conviction for fraudulently dealing with cheques,¹¹⁶ their Lordships allowed the appeal and “record[ed] their deep disquiet that by a series of misjudgments the appellant and his co-accused Wong have suffered a grievous injustice. They have been fined, imprisoned and publicly disgraced for offences of which they were not guilty.”¹¹⁷ Commenting on the judgment in Parliament on 19 January 1989, the Minister for Law, relying on the Attorney-General’s advice,¹¹⁸ noted that the Privy Council’s remarks were not binding on the Government. By not inviting the Public Prosecutor to make submissions on Jeyaretnam’s convictions, the Privy Council had “violated a basic rule of natural justice: that a court should not reach a decision without hearing both sides of an argument”.¹¹⁹ In the Government’s view, Jeyaretnam had been correctly convicted and there had been no miscarriage of justice.¹²⁰

Jeyaretnam was not qualified to stand for Parliament for five years from the dates of his convictions,¹²¹ and thus did not participate in the 1988 and 1991 general elections. Another suit by the Prime Minister against Jeyaretnam in the wake of the 1988 general election required the courts to consider the compatibility of the existing law of defamation with the right to freedom of speech and expression guaranteed by art. 14(1)(a) of the *Constitution*. Campaigning for the WP, Jeyaretnam had averred that Lee had advised Teh Cheang Wan, the Minister for National Development, to commit suicide to avoid being investigated for alleged corruption. The Court of Appeal declined to adopt a public figure defence along the lines of *New York Times v. Sullivan*¹²² and *Lingens v. Austria*,¹²³ and affirmed the constitutionality

(Cap. 68, 1985 Rev. Ed. Sing.), s. 217(2): “A clerical error may be rectified at any time and any other mistake may be rectified at any time before the court rises for the day.” The equivalent provision in the *Criminal Procedure Code* (Cap. 68, 2012 Rev. Ed. Sing.), which is worded differently, is s. 301.

¹¹⁶ Jeyaretnam and Wong Hong Toy were convicted by the High Court for having a common intention to fraudulently deliver to third parties without adequate consideration to a judgment creditor three cheques which were the WP’s property, knowing it to be likely that this would prevent the distribution of property to the judgment creditor, an offence under s. 421 of the *Penal Code* read with s. 34. They were fined \$3,000 each (\$1,000 for each cheque), and three weeks’ imprisonment if they defaulted in paying the fines: *Public Prosecutor v. Wong Hong Toy* [1985–1986] S.L.R.(R.) 126 (H.C.). The High Court overturned their acquittal on the charges by the District Court.

¹¹⁷ *Jeyaretnam Joshua Benjamin v. Law Society of Singapore* [1988] 2 S.L.R.(R.) 470 at para. 59 (P.C.) (on appeal from Singapore).

¹¹⁸ Sing., *Parliamentary Debates*, vol. 52, cols. 361–364 (19 January 1989) (Tan Boon Teik, Attorney-General), “Advice of the Attorney-General on the Judicial Committee’s Judgment in Privy Council Appeal No. 10 of 1988—*Joshua Benjamin Jeyaretnam v. The Law Society of Singapore*”.

¹¹⁹ Sing., *Parliamentary Debates*, vol. 52, col. 278 (19 January 1989) (S. Jayakumar, Minister for Law).

¹²⁰ *Ibid.* at cols. 277–280.

¹²¹ *Singapore Constitution*, art. 45(2).

¹²² 376 U.S. 254 (1964).

¹²³ (1986) 8 E.H.R.R. 407.

of the existing law.¹²⁴ It affirmed¹²⁵ the High Court's award of damages of \$260,000.¹²⁶

Though Jeyaretnam unsuccessfully contested the 1997 general election, as one of the 'best losers' he became a Non-constituency Member of Parliament ("NCMP"). The 1997 election witnessed defamation suits by Goh Chok Tong, now Prime Minister and Secretary-General of the PAP, Deputy Prime Minister Lee Hsien Loong, Senior Minister Lee Kuan Yew and other PAP MPs against Jeyaretnam and his running mate, Tang Liang Hong. Thirteen sets of proceedings were commenced by the plaintiffs against Tang for various remarks he had made touching their fitness to lead the country. In particular, Tang had implied that Goh, Lee Hsien Loong and Lee Kuan Yew had given something to a property developer in exchange for obtaining discounts when purchasing residential property. The defences filed by Tang were struck out in 12 suits for non-compliance with court orders, and in the suit brought by Goh for disclosing no defence.¹²⁷ The High Court assessed the total amount of damages payable by Tang to the plaintiffs at \$8.075 million.¹²⁸ This was reduced on appeal to \$6.675 million.¹²⁹ The actions against Jeyaretnam stemmed from remarks he had made on the eve of polling day. Tang had been criticized by the plaintiffs as anti-Christian and a Chinese chauvinist, and thus unfit to be elected an MP. In remarks to the media, Tang said that he would be making a police report as the MPs had been "telling lies", "defaming" and "assassinating [his] character".¹³⁰ On 1 January 1997, Tang made two police reports. At the election rally at which Jeyaretnam was speaking, Tang went to the podium and placed some documents in front of him. Just before concluding his speech, Jeyaretnam said: "Mr. Tang Liang Hong has just placed before me two reports he has made to the police against, you know, Mr. Goh Chok Tong and his people." Where Goh's suit was concerned, the Court of Appeal accepted that the statement was defamatory in that it implied that he had acted in a seriously wrong manner by attacking Tang and that he would likely be subject to a police investigation, and awarded damages of \$100,000.¹³¹

Two defamation suits relating to articles that appeared in the WP's official publication, *The Hammer*, were heard during Jeyaretnam's second stint in Parliament. The first related to an article critical of Tamil Language Week which appeared in the August 1995 issue of *The Hammer*. The members of the organizing committee of Tamil Language Week sued Jeyaretnam as editor of the newsletter, along with the author of the article, the newsletter's printer, and the WP itself. Ten of the plaintiffs were found to have made out their claim, and Jeyaretnam, the article's author and

¹²⁴ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 S.L.R.(R.) 791 (C.A.). For commentary on this case, see Michael Hor, "The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*" [1992] Sing. J.L.S. 542.

¹²⁵ *Ibid.* at paras. 84–87.

¹²⁶ *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1990] 1 S.L.R.(R.) 709 at para. 61 (H.C.). For commentary on this case, see Michael Hor & Collin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 Sing. L. Rev. 296 at 311–318.

¹²⁷ *Goh Chok Tong v. Tang Liang Hong* [1997] 1 S.L.R.(R.) 811 (H.C.).

¹²⁸ *Lee Kuan Yew v. Tang Liang Hong* [1997] 2 S.L.R.(R.) 81 (H.C.).

¹²⁹ *Tang Liang Hong v. Lee Kuan Yew* [1997] 3 S.L.R.(R.) 576 (C.A.).

¹³⁰ *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1997] 3 S.L.R.(R.) 46 at para. 12 (H.C.).

¹³¹ *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 2 S.L.R.(R.) 971 (C.A.).

the WP were jointly ordered to pay \$55,000 to them.¹³² In 1996, Jeyaretnam and fellow members of the WP's executive council were sued by a group of PAP MPs, including the Minister for Law and for Foreign Affairs, S. Jayakumar, in respect of another article in *The Hammer*. The defendants admitted liability but the plaintiffs nonetheless filed suit because the quantum of damages could not be agreed upon.¹³³ The case was settled on 8 September 1997 the first day of a five-day hearing for the assessment of damages, with the plaintiffs agreeing to accept damages and costs of \$200,000.¹³⁴

In November 2000, Jeyaretnam agreed to pay the outstanding damages due to the plaintiffs in the Tamil Language Week case in instalments, on condition that if he failed to pay any instalment the plaintiffs were at liberty to proceed with bankruptcy petitions against him and he would consent to being made a bankrupt.¹³⁵ He made the first two payments, but then defaulted on the third instalment. The plaintiffs thus proceeded with their bankruptcy petitions against Jeyaretnam, and an order to that effect was made against him on 19 January 2001 by an assistant registrar of the High Court.¹³⁶ The bankruptcy order was confirmed on appeal to a High Court judge,¹³⁷ and to the Court of Appeal.¹³⁸ The submission that the agreement was extortionate and, thus, the bankruptcy proceedings had been used as an "instrument of oppression",¹³⁹ was rejected.¹⁴⁰ As a result, Jeyaretnam lost his NCMP seat on 23 July 2001, the date his appeal was dismissed by the Court of Appeal,¹⁴¹ and was unable to contest the general election held later that year. Jeyaretnam failed in his attempt to be discharged from bankruptcy in 2004 in order to participate in the general election eventually held in 2006,¹⁴² and he was only granted a conditional discharge by the Court of Appeal in 2007.¹⁴³ In 2008 he established a new political party, the Reform Party of Singapore, in preparation for the next election. However, he died just over three months later, on 30 September 2008, aged 82.

Dr. Chee Soon Juan, Secretary-General of the SDP and an unsuccessful candidate in the 2001 general election, was sued by Lee Kuan Yew and Goh Chok Tong for remarks he made during the campaigning period. Although Chee apologized to Lee and Goh at an election rally and in two newspapers, and agreed to pay them damages and costs, he resisted applications for interlocutory judgment to be entered against

¹³² *Nirumalan K Pillay v. A Balakrishnan* [1999] SGHC 4, aff'd *Balakrishnan v. Nirumalan K Pillay* [1999] 2 S.L.R.(R.) 462 (C.A.).

¹³³ *Shunmugam Jayakumar v. Jeyaretnam Joshua Benjamin* [1996] 2 S.L.R.(R.) 658 (H.C.).

¹³⁴ Ahmad Osman, "WP and 12 Members to Pay S\$200,000 for Defaming MPs" *The Straits Times* (9 September 1997).

¹³⁵ *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2001] 1 S.L.R.(R.) 415 at para. 2 (H.C.) [*Ex parte Indra Krishnan* (H.C.)].

¹³⁶ *Ibid.* at paras. 5–7.

¹³⁷ *Ex parte Indra Krishnan* (H.C.), *supra* note 135.

¹³⁸ *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2001] 2 S.L.R.(R.) 733 (C.A.).

¹³⁹ *Re Major, a Debtor* [1955] Ch. 600 at 624, cited in *Jeyaretnam Joshua Benjamin v. Indra Krishnan* [2005] 1 S.L.R.(R.) 395 (C.A.) at para. 25 [*JB v. Indra Krishnan*].

¹⁴⁰ *JB v. Indra Krishnan, ibid.* at paras. 25–30.

¹⁴¹ Sing., *Parliamentary Debates*, vol. 73, cols. 1822, 1823 (25 July 2011) (Tan Soo Khoo, Speaker).

¹⁴² *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2004] 3 S.L.R.(R.) 133 (H.C.); *Jeyaretnam Joshua Benjamin v. Indra Krishnan* [2005] 1 S.L.R.(R.) 395 (C.A.).

¹⁴³ *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2007] 3 S.L.R.(R.) 433 (C.A.) at paras. 37, 38, rev'g [2007] SGHC 14 at paras. 33, 34. The condition was that Jeyaretnam had to pay 45% of the outstanding debts.

him. In his defence, among other things, he denied having made the remarks, and that they had any defamatory effect even if they had been made. Subsequently, he admitted to having made the remarks. Interlocutory judgments were granted by the High Court,¹⁴⁴ and damages assessed at \$200,000 for Lee¹⁴⁵ and \$300,000 for Goh.¹⁴⁶ Due to his inability to pay the damages and costs, Chee was made a bankrupt which disqualified him from contesting the general elections held in 2006 and 2011. In 2012, Chee offered \$30,000 to Lee and Goh in settlement of their claims, stating that he wished to have his bankruptcy discharged in order to stand as a candidate in the next general election which is due by 2016.¹⁴⁷ On 11 September, the Official Assignee informed Chee that Lee and Goh had accepted his offer.¹⁴⁸

Chee and the SDP were also sued by Lee Hsien Loong, who had by this time become the Prime Minister, and by Lee Kuan Yew, now Minister Mentor, over articles published in the SDP newspaper *The New Democrat* around February 2006. The High Court granted summary judgment in the plaintiffs' favour on the basis that passages in the articles were defamatory and the defendants had not adduced sufficient facts to support the defences relied on.¹⁴⁹ Damages were assessed in a separate hearing at \$330,000 for the Prime Minister and \$280,000 for the Minister Mentor.¹⁵⁰

To conclude this narration, it may be noted that over the past three decades successful defamation proceedings have also been brought by Cabinet members against the media, including the *International Herald Tribune*¹⁵¹ and the *Far Eastern Economic Review*.¹⁵² In a 2010 case involving the publisher of the latter magazine, the Court of Appeal declined to hold that a defence of responsible journalism as applied by the House of Lords in *Reynolds v. Times Newspapers Ltd*¹⁵³ was part of Singapore law.

B. Reliance on the Rule of Law by Critics

The existence and employment of the *ISA* and the bringing of defamation suits by Cabinet members and PAP MPs against opposition politicians are frequently cited by critics of Government policy as evidence of a failure to comply with the rule of law, though these are by no means the only issues complained about.

Unsurprisingly, the most vocal critics based in Singapore are the opposition politicians who have themselves been affected by measures taken by the Government or its members. About two months after the Government brought into force amendments to the *Constitution* and the *ISA* to reverse the legal effects of *Chng Suan Tze*, the

¹⁴⁴ *Lee Kuan Yew v. Chee Soon Juan* [2003] 3 S.L.R.(R.) 8 (H.C.); *Goh Chok Tong v. Chee Soon Juan* [2003] 3 S.L.R.(R.) 32 (H.C.).

¹⁴⁵ *Lee Kuan Yew v. Chee Soon Juan* [2005] 1 S.L.R.(R.) 552 (H.C.).

¹⁴⁶ *Goh Chok Tong v. Chee Soon Juan* [2005] 1 S.L.R.(R.) 573 (H.C.).

¹⁴⁷ "Chee Offers \$30k to Clear Bankruptcy Case" *The Straits Times* (27 July 2012).

¹⁴⁸ Tessa Wong, "Chee's \$30k Offer to Settle Bankruptcy Accepted: SDP" *The Straits Times* (12 September 2012).

¹⁴⁹ *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 S.L.R.(R.) 675 (H.C.).

¹⁵⁰ *Lee Hsien Loong v. Singapore Democratic Party* [2009] 1 S.L.R.(R.) 642 (H.C.).

¹⁵¹ *Lee Kuan Yew v. Vinocur* [1995] 3 S.L.R.(R.) 38 (H.C.).

¹⁵² *Lee Kuan Yew v. Davies* [1989] 2 S.L.R.(R.) 544 (H.C.); *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 S.L.R. 52 (C.A.).

¹⁵³ [2001] 2 A.C. 127 (H.L.), not applied in *Review Publishing*, *supra* note 152.

European Committee for Human Rights in Malaysia and Singapore (KEHMA-S) and the Rainbow Group of the European Parliament organized a conference on 9 and 10 March 1989 to discuss the rule of law and human rights in Malaysia and Singapore. J. B. Jeyaretnam was among the participants. His presentation, subsequently published in the conference report under the title “The Rule of Law in Singapore”,¹⁵⁴ was a wide-ranging broadside which accused the Government of failing to uphold various human rights. These included housing and labour rights; and the rights to free speech and assembly which, he said, had been infringed by laws requiring newspapers to be licensed and enabling the circulation of foreign serial publications to be restricted, and by the requirement for permits in order to hold demonstrations and rallies. He also criticized the existence of the *ISA* and the *Criminal Law (Temporary Provisions) Act* (“*CLTPA*”).¹⁵⁵ The latter statute empowers the Home Affairs Minister to detain without trial a person who has been “associated with activities of a criminal nature” if this is deemed necessary “in the interests of public safety, peace and good order”.¹⁵⁶

On 24 November 1999, Jeyaretnam, an NCMP at this time, returned to these themes when he moved the following motion in the House: “That this House recognises the importance of the Rule of Law and urges the government to ensure the complete and full observance of the Rule of Law by all Ministers, officials and public servants.”¹⁵⁷ He traced the doctrine back to the *Magna Carta*¹⁵⁸ and expressed the view that “[i]t has become part of the Constitution”, particularly the part “which enacts the fundamental liberties of the people”. He singled out art. 9 and 12, which respectively protect rights to liberty and equality, as “the most important ones”.¹⁵⁹ Jeyaretnam then alleged eight instances where, in his view, the Government had violated the rule of law. These included detentions without trial under the *ISA* and the *CLTPA*; denial of the right to counsel; and denial of freedom of speech and assembly, including freedom of the press.¹⁶⁰ Chiam See Tong of the Singapore People’s Party complained that the Government had not treated opposition parties and the PAP equally as regards issuing licences for the holding of events.¹⁶¹ The claims by the two opposition MPs that the Government had breached human rights standards indicate that they had a substantive conception of the rule of law.

¹⁵⁴ J. B. Jeyaretnam, “The Rule of Law in Singapore” in *The Rule of Law and Human Rights in Malaysia and Singapore: A Report of the Conference Held at the European Parliament, 9 & 10 March 1989* (Limelette, Belgium: KEHMA-S, 1989), 30 [Rule of Law Conference]. See also Etienne Jaudel, “Assessment of the State of Human Rights in Malaysia and Singapore from an International Perspective”, Rule of Law Conference, 23 at 25, 28, expressing the view that the Internal Security Acts of the two countries are “nothing more than an invitation to the arbitrary use of power”, and that “there is no freedom to hold public rallies. There is no freedom of access to press or TV. There is no freedom to disseminate ideas and information, meaning that the possibility of electoral success is severely limited.”

¹⁵⁵ Cap. 67, 2000 Rev. Ed. Sing.

¹⁵⁶ *Ibid.* s. 30(a).

¹⁵⁷ Sing., *Parliamentary Debates*, vol. 71, col. 570 (24 November 1999) (J.B. Jeyaretnam, Non-constituency Member of Parliament).

¹⁵⁸ *Ibid.* at cols. 571, 572.

¹⁵⁹ *Ibid.* at cols. 574, 575.

¹⁶⁰ *Supra* note 157 at cols. 576–578.

¹⁶¹ Sing., *Parliamentary Debates*, vol. 71, cols. 582–584 (24 November 1999) (Chiam See Tong, Potong Pasir SMC).

In contrast, Ministers and PAP MPs who participated in the debate tended to rely on the more formal conceptions of the doctrine. For instance, Ho Peng Kee, the Minister of State for Law, expressed the view that the rule of law:¹⁶²

[R]efers to the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notions of the transparency, openness and prospective application of our laws, observation of the principles of natural justice, independence of the Judiciary and judicial review of administrative action.

He said that these elements were “established features of our legal system”¹⁶³ and refuted Jeyaretnam’s contentions that the *ISA* and *CLTPA* breached the rule of law, noting that there were safeguards such as advisory boards to confirm detentions, and that the statutes had all been “done legally and carefully drafted by our Attorney-General’s Chambers. And of course, all are subject to the requirements of the Constitution and all coming to this House to be debated and passed [*sic*].”¹⁶⁴

Chin Tet Yung, a PAP MP for Sembawang Group Representation Constituency, said the rule of law required that:¹⁶⁵

All laws are prospective, stable, properly and constitutionally enacted. The application of laws, the making of legal orders by public officers should be guided by clear and general rules, that is, avoiding any personal bias or favour, treating equal cases equally, making decisions rationally and in the public interest, and in accordance with the written laws of the land. ... In this particular principle where you have laws, obviously such laws must be applied and obviously the laws are applied by public officers who make legal orders. If these legal orders are substantiated by subsidiary legislation, if this subsidiary legislation is sanctioned by parent Acts, by the primary legislation, then any order issuing from it would be legitimate and would comply with the Rule of Law. And, if anyone is unhappy with that, there is always the next aspect or principle of the Rule of Law, and that is, that the judiciary has the power and the authority to review any administrative action. So that is the third principle. The final principle... is that the judiciary must be independent and the courts should be generally accessible to all who seek recourse to them.

He moved an amendment to the motion introduced by Jeyaretnam so that it read: “That this House (1) values the importance of the Rule of Law; and (2) commends the Government for upholding the Rule of Law and ensuring that it is fully observed by all.”¹⁶⁶ The amendment motion was ultimately voted on and passed by a majority of MPs in Parliament.¹⁶⁷

¹⁶² Sing., *Parliamentary Debates*, vol. 71, col. 592 (24 November 1999) (Ho Peng Kee, Minister of State for Law).

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* at col. 594.

¹⁶⁵ Sing., *Parliamentary Debates*, vol. 71, cols. 602, 603 (24 November 1999) (Chin Tet Yung, Sembawang GRC).

¹⁶⁶ *Ibid.* at cols 605, 606.

¹⁶⁷ Sing., *Parliamentary Debates*, vol. 71, col. 634 (24 November 1999).

Chee Soon Juan, in a chapter entitled “Rights and the Rule of Law” in his 1994 book *Dare to Change*,¹⁶⁸ criticized the detention of persons by the Government under the ISA following Operation Spectrum and on other occasions.¹⁶⁹ He emphasized the importance of rights to free speech and association, saying that:¹⁷⁰

Singapore must be a home to Singaporeans, not a hotel and casino. For it to be a home, Singaporeans must be given a say in how the country is run. For this to happen, people must be free to organise themselves into useful groups which can help society, groups that need not be political parties. These fundamental freedoms of speech and association are beyond political rhetoric. They are essential for our society’s progress.

He lamented the lack of these freedoms in Singapore, claiming that “the PAP Government has made it abundantly clear that it does not want participation of the people in matters of interest to the nation” because the Government had “insist[ed] that all who wish to say anything political must join a political party”.¹⁷¹

Chee spelled out his understanding of the rule of law in an open letter addressed to the Chief Justice, the Attorney-General and the Minister for Law which was published on the SDP website on 6 January 2009:¹⁷²

[T]he rule of law is not just a system where the government passes legislation and everyone unquestioningly obeys. The concept of the rule of law necessitates the limitation of state power and the respect of human rights. Our Constitution spells out what these limitations are. It also defines the rights of the citizen.

Subsequently, in a speech delivered to the International Bar Association Conference in Dubai on 4 November 2011, he stated that the existence of free media and the rights to free expression and peaceful assembly were essential elements of the rule of law.¹⁷³

Conceptions of the rule of law that require human rights protection also characterize the opinions of critics of Government policy based outside Singapore. An early example is the 1990 report by the New York City Bar Association’s Committee on International Human Rights entitled *The Decline of the Rule of Law in Singapore and Malaysia*.¹⁷⁴ The report claimed that “the rule of law in Singapore today has

¹⁶⁸ Chee Soon Juan, *Dare to Change: An Alternative Vision for Singapore* (Singapore: Singapore Democratic Party, 1994) at 137.

¹⁶⁹ *Ibid.* at 139–146.

¹⁷⁰ *Ibid.* at 148.

¹⁷¹ *Ibid.*

¹⁷² Chee Soon Juan, “Chee responds to CJ, AG and Law Minister” (6 January 2009), online: Singapore Democratic Party <<http://yoursdp.org/index.php/perspective/special-feature/1681-chee-responds-to-cj-ag-and-law-minister>> (last accessed: 28 March 2012; archived at <<http://www.webcitation.org/66VD0xg5J>>).

¹⁷³ Chee Soon Juan, “Text of Dr. Chee Soon Juan’s Speech at the International Bar Association Conference in Dubai on 4 Nov 2011 (Presented via Video)” (4 November 2011), online: Singapore Democratic Party <<http://classic3.yoursdp.org/index.php/perspective/special-feature/5046-text-of-chee-soon-juans-speech-to-iba>> (last accessed: 28 March 2012; archived at <<http://www.webcitation.org/66VCusHQp>>). See also Chee Soon Juan, “The Media and Censorship” in *Your Future, My Faith, Our Freedom: A Democratic Blueprint for Singapore* (Singapore: Open Singapore Centre, 2001) at 166; and Chee Soon Juan, *Democratically Speaking* (Singapore: Chee Soon Juan, 2012) at 145–236.

¹⁷⁴ *Decline in the Rule of Law*, *supra* note 3.

given way to empty legalism. In the British tradition, the Singapore government scrupulously applies the law on the books. But that law no longer restrains government actions or protects individual rights.”¹⁷⁵ It alleged that “serious human rights violations” had taken place in Singapore, which included “use of the Internal Security Act to detain non-violent dissenters” and “restrictions on freedom of speech, association, religion and the press”.¹⁷⁶ In addition to expressing concern about the Operation Spectrum detentions under the *ISA*,¹⁷⁷ the report’s authors noted that Chia Thye Poh, a former Barisan Socialis MP, was detained under the *ISA* between 1966 and 1989, and then permitted to live on Sentosa island with restrictions on his activities and movements.¹⁷⁸ (All restrictions on him were finally lifted with effect from 27 November 1998.)¹⁷⁹ The report concluded that the *ISA* contravened international standards on administrative detention.¹⁸⁰

Where other fundamental freedoms were concerned, the report highlighted the existence of laws restricting the media such as the *Broadcasting and Television Act*¹⁸¹ and the *Newspaper and Printing Presses Act*.¹⁸² Under powers granted by the latter statute,¹⁸³ in 1986 and 1987 the Minister for Communications and Information curtailed the circulation of *Time* magazine, the *Asian Wall Street Journal* and the *Far Eastern Economic Review* for “engaging in the domestic politics of Singapore”.¹⁸⁴ Moreover, Lee Kuan Yew successfully sued the *Review* for libel in 1987¹⁸⁵ in an article about the *ISA* detentions which occurred that year. A statement on the High Court judgment by the president of Dow Jones & Co, owner of the *Review*, which was published by Dow Jones’ *Asian Wall Street Journal*, led to a charge of contempt of court by scandalizing the court.¹⁸⁶ As regards the freedom of religion, the New York City Bar Association’s report conveyed unease about a bill—now the *Maintenance of Religious Harmony Act*¹⁸⁷—that would permit the Minister for Home Affairs to bar religious workers deemed subversive or threatening to religious harmony from addressing

¹⁷⁵ *Ibid.* at 46.

¹⁷⁶ *Ibid.* at 4, 5.

¹⁷⁷ *Ibid.* at 57–70.

¹⁷⁸ *Ibid.* at 70–73.

¹⁷⁹ “Chia Thye Poh to be Allowed to Live in S’pore” *The Straits Times* (16 November 1992) at 37; Muhammad Shah, “Chia Thye Poh a Free Man” *The Straits Times* (27 November 1998) at 2.

¹⁸⁰ *Decline in the Rule of Law*, *supra* note 3 at 73–76.

¹⁸¹ Cap. 28, 1985 Rev. Ed. Sing. Broadcasting is now governed by the *Broadcasting Act* (Cap. 28, 2012 Rev. Ed. Sing.).

¹⁸² Cap. 206, 1985 Rev. Ed. Sing., now the 2002 Rev. Ed. Sing. [*NPPA*]. For commentary on press freedom in Singapore, see Thio Li-ann, “Human Rights and the Media in Singapore” in Robert Haas, ed., *Human Rights and the Media* (Singapore: Asian Institute for Development Communication; Friedrich Naumann Foundation, Singapore Office, 1996) 69 at 69–79; James Gomez, *Freedom of Expression and the Media in Singapore* (Singapore: Article 19, 2005); Tey Tsun Hang, “Confining the Freedom of the Press in Singapore—A ‘Pragmatic’ Press for ‘Nation Building’?” (2008) 30 *Hum. Rts. Q.* 876; Cherian George, *Freedom from the Press: Journalism and State Power in Singapore* (Singapore: National University of Singapore Press, 2012); “Freedom of Speech, Assembly and Association” in Thio, *Treatise*, *supra* note 99, at paras. 14.098–14.127.

¹⁸³ Now in the *NPPA* (Cap. 206, 2002 Rev. Ed. Sing.), ss. 24, 25.

¹⁸⁴ *NPPA*, *ibid.* s. 24(1). See *Decline in the Rule of Law*, *supra* note, 3 at 103–106.

¹⁸⁵ *Lee Kuan Yew v. Davies*, *supra* note 152.

¹⁸⁶ *Attorney-General v. Wain* [1991] 1 S.L.R.(R.) 85 (H.C.). See *Decline in the Rule of Law*, *supra* note 3 at 106–109.

¹⁸⁷ Cap. 167A, 2001 Rev. Ed. Sing.

congregations and holding office in religious publications.¹⁸⁸ It concluded by calling upon the administration of President George H. W. Bush to use “more forceful public diplomacy” in publicly condemning *ISA* detentions and “[urging] an end to the other troubling authoritarian trends documented in this report”.¹⁸⁹

In a report called *Rule of Law in Singapore* published in 2007,¹⁹⁰ Lawyers’ Rights Watch Canada alleged that defamation suits had been used “to stifle and punish criticism by opposition politicians”, and they had created a “chilling effect... on the freedom of political expression in Singapore”.¹⁹¹ It noted how defamation and bankruptcy actions had led to Jeyaretnam twice losing his Parliamentary seat.¹⁹² Concern was also expressed about stringent limits on the freedom of assembly, which had led to Chee Soon Juan being fined and imprisoned on a number of occasions for taking part in public assemblies without the requisite permits; and detentions under the *ISA*.¹⁹³ The organization concluded that “Singapore is not governed by the rule of law”.¹⁹⁴

Similar sentiments were expressed by the International Bar Association Human Rights Institute (“IBAHRI”) in its 2008 report, *Prosperity versus Individual Rights? Human Rights, Democracy and the Rule of Law in Singapore*.¹⁹⁵ The Institute argued that political opposition and expression had been stifled by defamation laws—referring specifically to the defamation suits brought against Jeyaretnam, Tang and Chee¹⁹⁶—and actions taken against websites.¹⁹⁷ It also highlighted restrictions on press freedom and free assembly, respectively in the form of defamation suits and the *NPPA*,¹⁹⁸ and the authorities’ refusal to issue permits for outdoor assemblies.¹⁹⁹ Summing up, the IBAHRI said:²⁰⁰

The IBAHRI strongly encourages Singapore to engage with the international community in a more constructive manner, and to take steps to implement international standards of human rights throughout Singapore. It is imperative that

¹⁸⁸ *Decline in the Rule of Law*, *supra* note 3 at 109, 110.

¹⁸⁹ *Ibid.* at 114, 115.

¹⁹⁰ Kelley Bryan, Gail Davidson & Margaret Stanier, *Rule of Law in Singapore: Independence of the Judiciary and the Legal Profession in Singapore* (Vancouver: Lawyers’ Rights Watch Canada, 2007), online: Lawyers’ Rights Watch Canada <<http://web.archive.org/web/20080828044807/http://www.lrwc.org/documents/LRWC.Rule.of.Law.in.Singapore.17.Oct.07.pdf>> (last accessed: 25 September 2012).

¹⁹¹ *Ibid.* at 4.

¹⁹² *Ibid.* at 5–8.

¹⁹³ *Ibid.* at 18, 19.

¹⁹⁴ *Ibid.* at 21.

¹⁹⁵ *Prosperity versus Individual Rights? Human Rights, Democracy and the Rule of Law in Singapore* (London: International Bar Association, 2008), online: International Bar Association <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-C4DA-473B-943A-DD0FC76325E8>> (last accessed: 27 September 2012; archived at <<http://web.archive.org/web/20100711032638/http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-C4DA-473B-943A-DD0FC76325E8>>).

¹⁹⁶ *Ibid.* at 26–39.

¹⁹⁷ *Ibid.* at 46–48.

¹⁹⁸ *Ibid.* at 39–45.

¹⁹⁹ *Ibid.* at 62–65.

²⁰⁰ *Ibid.* at 69.

Singapore now takes its place as a leader in the region, not only in business and economic development, but in human rights, democracy and the rule of law.

A strong and robust rule of law requires respect for and protection of democracy, human rights—including freedom of expression and freedom of assembly—and an independent and impartial judiciary. The IBAHRI is concerned that, despite many positive achievements, the Singapore Government is currently failing to meet established international standards in these areas.

In its response to the report,²⁰¹ the Ministry of Law said that it contained “serious factual inaccuracies”.²⁰² It noted that international law recognizes no unfettered right for individuals or the media to malign the reputation of others with impunity, and that Singapore courts are not alone in holding that no special privilege attaches to criticism of politicians. In any case, truth is a complete defence to a defamation claim, and other opposition politicians such as Chiam See Tong and Low Thia Khiang have never defamed their political opponents. Chiam had, in fact, reached an out-of-court settlement with two Government ministers whom he claimed to have defamed him, and had successfully sued²⁰³ members of the SDP’s Central Executive Committee for libel and had been awarded damages of \$120,000.²⁰⁴ As regards press freedom, the Ministry said that the *NPPA* was intended to:²⁰⁵

[P]rotect the public interest, prevent manipulation by foreign elements to glorify offensive viewpoints and prevent newspapers from being used as instruments of subversion. We make no apology for this, as freedom of the press does not, in our view, equate to the press purporting to act as an unaccountable pressure group.

It justified the banning of public protests by saying that “[w]e do not wish to follow the path of some countries, where the will of the general electorate and of the elected Government can be thwarted by demonstrations mounted by disaffected pressure groups.”²⁰⁶ The Ministry affirmed that:²⁰⁷

The principle of the Rule of Law is fundamental in Singapore. The Singapore Government exercises its authority through laws that are adopted and enforced by an independent judiciary in accordance with established and accepted procedures. No one is above the law.

²⁰¹ “Singapore’s Response to the International Bar Association’s Report on Singapore”, annexed to a letter (reference no LAW/06/021/026) dated 14 November 2008 from Mark Jayaratnam, Deputy Director, Legal Policy Division, Ministry of Law, to the Chairman of the Human Rights Institute Council of the International Bar Association, online: Ministry of Law <<http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=gDkKt5ebvTY%3d&tabid=204>> (last accessed: 27 September 2012; archived at <<http://www.webcitation.org/6B1FmYJMJ>>) [Response to the IBA’s Report].

²⁰² *Ibid.* at para. 4.

²⁰³ *Chiam See Tong v. Ling How Doong* [1996] 3 S.L.R.(R.) 942 (H.C.).

²⁰⁴ Response to the IBA’s Report, *supra* note 201 at paras. 41, 42.

²⁰⁵ *Ibid.* at para. 61.

²⁰⁶ *Ibid.* at para. 80.

²⁰⁷ *Ibid.* at para. 15.

The World Justice Project has been publishing an annual Rule of Law Index since 2010. In its 2011 Index,²⁰⁸ it defines the rule of law as “a rules-based system in which the following four universal principles are upheld”:²⁰⁹

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

These principles were the result of a deliberate choice to “strike a balance between thinner and thicker conceptions of the rule of law”.²¹⁰ As regards the inclusion of the reference to fundamental rights, the report’s authors stated that:²¹¹

the rule of law must be more than merely a system of rules—that indeed, a system of positive law that fails to respect core human rights guaranteed under international law is at best ‘rule by law’, and does not deserve to be called a rule of law system.

However,²¹²

given the impossibility of assessing adherence to the full panoply of civil, political, economic, social, cultural, and environmental rights recognized in the Universal Declaration [of Human Rights], the principles treat a more modest menu of rights, primarily civil and political, that are firmly established under international law and bear the most immediate relationship to rule of law concerns.

The Rule of Law Index ranked Singapore highly on factors such as order and security (with a ranking of 2 out of the 66 countries assessed), absence of corruption (4/66), and effective criminal justice (5/66), but less highly on open government (19/66), limited government powers (20/66) and fundamental rights (39/66).²¹³ It commented that “[n]otwithstanding the country’s outstanding performance in most categories, there are substantial limitations on freedom of speech and freedom of assembly, with Singapore in 49th and 60th place, respectively, out of all 66 countries”.²¹⁴

This brief review does not examine all the critiques of human rights protection in Singapore; it covers the main ones in which Government critics have overtly employed rule of law discourse. The explicit references to human rights in these

²⁰⁸ Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011* (Washington, D.C.: The World Justice Project, 2011), online: The World Justice Project <http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf> (last accessed: 27 September 2012; archived at <<http://www.webcitation.org/66VRkmcQK>>).

²⁰⁹ *Ibid.* at 1.

²¹⁰ *Ibid.* at 9.

²¹¹ *Ibid.* at 12.

²¹² *Ibid.* at 10.

²¹³ *Ibid.* at 92.

²¹⁴ *Ibid.* at 28.

critiques point to substantive conceptions of the rule of law. Jeyaretnam's 1989 conference paper, which referred to socio-economic rights such as rights to housing and labour, evinces aspects of the thickest form of the substantive conception. Most other critics focus on the extent to which civil and political rights are, in their view, protected in Singapore and, by implication, the importance of democracy. Thus, their views of the rule of law can be classified as thin or intermediate substantive conceptions.

As mentioned earlier, a number of Government ministers and PAP MPs who spoke during the 1999 parliamentary debate on the rule of law appeared to hold more formal conceptions of the rule of law. Because opposition MPs charged that the Government had failed to uphold the rule of law by breaching fundamental liberties, this became a comparison between apples and oranges, and ultimately a rather 'fruitless' debate. However, an attitudinal shift is detectable in the Government's response to the IBAHRI's 2008 report. It called attention to the fact that the fundamentals for Singapore's success include "[f]ree and fair elections held regularly" and "[a] free society where individual human dignity is protected", but "[t]he reality is that there are often situations where the pursuit of one norm conflicts with another and decisions have to be taken on the appropriate balance to be struck between them".²¹⁵ These statements—together with the Government's defence of Singapore's laws—arguably embody a substantive conception of the rule of law, but one that favours communitarian values over individual rights. One scholar has characterized this as a "competing 'thick' version [of the rule of law] fashioned after an illiberal model which prioritises statist goals like economic growth and social control by a relatively incorrupt government".²¹⁶

III. CONCLUDING THOUGHTS

I conclude with one final example of the current state of play. In 2009 the International Section of the New York State Bar Association held its fall meeting in Singapore. During a plenary session, Minister for Law K. Shanmugam delivered a speech on the Government's conception of the rule of law.²¹⁷ While he said he would not try to

²¹⁵ Response to the IBA's Report, *supra* note 201, at paras. 22, 32.

²¹⁶ Li-ann Thio, "Rule of Law within a Non-liberal 'Communitarian' Democracy: The Singapore Experience" in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: Routledge Curzon, 2004) 183 at 208. See also Gordon Silverstein, "Singapore: The Exception that Proves Rules Matter" in Tom Ginsburg & Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) 73 at 98:

China has (as have others no doubt) studied the ways in which Singapore has come to understand that the basic requirements of the rule of law can be embedded in a 'non-liberal thick conception'... just as it can be embedded in a liberal, thick conception as in the United States and Europe.

For a book-length treatment, see Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge: Cambridge University Press, 2012).

²¹⁷ K. Shanmugam, "Speech by Minister for Law K. Shanmugam at the New York State Bar Association (NYSBA) Rule of Law Plenary Session" (27 October 2009), online: Ministry of Law <<http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=444>> (last accessed: 28 September 2012; archived at <<http://www.webcitation.org/5l3yktXH>>).

define the rule of law comprehensively or attempt an academic analysis, he identified the following elements as “key aspects of a society based on Rule of Law”:²¹⁸

- (1) Exercise of State power should be through laws that are publicly known and enacted legitimately.
- (2) There should be independent, credible Courts to apply the law and decide on disputes between individuals, as well as between individuals and the State. There must be Separation of Powers.
- (3) No person should be above the law. That should apply in equal measure to the Government and officials as much as it does to everyone else.
- (4) There should be credible and effective means for people to challenge the arbitrary exercise of power.

The foregoing are very much in line with a formal conception of the rule of law. However, Shanmugam went on to mention two elements which were “part of a broader framework”. Although he felt it was “debatable whether they are part of a strict definition of Rule of Law... most people will accept them as being part of how a modern civilised society should be structured”. These were the “sovereign right” of the people to elect their government, and the requirement that “laws must not offend... society’s norms of fairness and justice”.²¹⁹ These allusions to democracy and human rights suggest a substantive conception of the rule of law of intermediate thickness, applying Tamanaha’s typology.

However, as other points made by the Law Minister bear out, the conception requires restrictions on human rights to ensure stability and promote economic growth. Democracy is seen as a prerequisite for giving the Government a strong mandate to implement, with minimal obstacles, policies that it deems best for Singapore.²²⁰ The Minister spoke of four essential conditions for establishing a proper system of governance in Singapore: the rule of law, stability, security from external threats, and a high-quality public service.²²¹ He saw the rule of law as a means to prevent the oppression of minorities by the majority, and to provide a secure environment for foreign investment.²²² As for stability, the serious Communist threat that Singapore faced from the 1950s and continuing extra-constitutional threats today justify the use of the *ISA*.²²³ Stability is achieved through, *inter alia*, the Government having power to act without hindrances such as lobbying and street protests, as “Government action has to be effective, efficient and speedy” in order to respond to changes in the external environment.²²⁴ Shanmugam said that some of the Government’s foreign critics fail to see problems arising in their own jurisdictions, are wont to assume that the values of Singapore society are the same as their societies’ values, and do not understand the need for different approaches for different societies.²²⁵ However, the Western liberal model of government (for example, having a press with few restrictions—which usually means a press controlled by magnates) cannot be

²¹⁸ *Ibid.* at para. 6.

²¹⁹ *Ibid.* at para. 7.

²²⁰ *Ibid.* at para. 54.

²²¹ *Ibid.* at paras. 16, 17.

²²² *Ibid.* at paras. 22, 25–31.

²²³ *Ibid.* at paras. 35–39, 59.

²²⁴ *Ibid.* at paras. 54–57.

²²⁵ *Ibid.* at para. 104.

applied without regard to “whether the people are empowered enough to work the levers of such a democracy”.²²⁶ Ultimately, “[e]very society seeks to strike a balance between the rights of the individual and the rights of society... We do tend to weight the balance more towards the society...”²²⁷

The response by Michael Galligan, Chairman of the New York State Bar Association’s International Section,²²⁸ conceived of the rule of law from a more conventional, liberal substantive standpoint. Nonetheless, he was sensitive to the need for assessing the extent to which rights might require curtailment. While he accepted that there were historical reasons for the introduction of the *ISA*, “whatever might be appropriate for times of extraordinary danger should not be assumed to be the measure for ordinary times”.²²⁹ He also noted that in Singapore libel claims are “a potent instrument in contests for political office and public opinion”²³⁰ because of the combined effect of constitutional provisions disqualifying people from being MPs if bankrupt or convicted of crimes and punished with a fine exceeding \$2,000; the existence of the offence of criminal defamation; and, in civil defamation, the absence of a cap on the quantum of damages, and the lack of qualified privilege for political statements even if the speaker is an election candidate.²³¹ He suggested a number of alternative methods for protecting politicians’ reputations which strike a better balance between people being able to freely attack political opponents and the current state of the law which has a chilling effect on political speech. For instance, speakers might be permitted to rely on a defence of qualified privilege unless they acted with knowing disregard or gross negligence, or successful claimants might be limited to recovering only their legal costs.²³²

Likewise, a more appropriate balance can be struck between press freedom and countervailing values such as the desirability of ensuring accurate reporting and fact-based comment. Disagreeing with Shanmugam’s view of the media’s role as only to provide information, he commented that it is hard for the media to report facts without considering the significance of what was reported. Furthermore, “limiting the role of the press to strict news reporting with no apparent room for comment or opinion denies to the press its function as a medium of political discussion and debate”.²³³ He concluded:²³⁴

I do not consider a purely formal or “thin” definition of “rule of law” to be adequate. Law does not exist in a social vacuum. It has purposes related to its social context. The extent or degree to which a nation needs a law or laws at all depends on the purposes or functions the law intends to serve—in particular, with regard to the rights and dignities of the individuals for whom the law is designed—in a manner that calls to mind to the way in which the US Supreme

²²⁶ *Ibid.* at para. 51.

²²⁷ *Ibid.* at paras. 78, 79.

²²⁸ Michael W. Galligan, “Singapore and the Rule of Law” (5 November 2009), online: New York State Bar Association <<http://www.webcitation.org/5mOGn8D8a>> (last accessed: 30 December 2009).

²²⁹ *Ibid.* at 1, 2, pt I, para. 1.

²³⁰ *Ibid.* at 3, pt I, para. 3.

²³¹ *Ibid.*

²³² *Ibid.* at 4, 5, pt I, para. 1.

²³³ *Ibid.* at 5–7, pt II, para. 2.

²³⁴ *Ibid.* at 8, 9, pt II, para. 4.

Court from time to time has found that determining what “process” is “due” under the Fourteenth Amendment to the US Constitution depends on the nature of the liberty interest at stake. In the scheme of matters for which adherence to the “rule of law” is particularly important, the integrity of public discussion, public debate and genuine choice in the process of electing governments should rank high because elections determine who the leaders will be who will have primary responsibility to see that the “rule of law” itself is sustained in public as well as private life.

Shanmugam and Galligan both adopted substantive conceptions of the rule of law, but differed over how the balance between human rights and other public interests should be struck in Singapore law. Nonetheless, the significance of their debate lies in the mutual recognition of the need to determine a suitable balance and, therefore, the fact that the enjoyment of human rights is not absolute but may be limited for proper reasons. The path to more constructive discussions has been laid—we may hope there no longer exists a situation of “East is East, and West is West, and never the twain shall meet”. Rather, “there is neither East nor West... [w]hen two strong men stand face to face, though they come from the ends of the earth!”²³⁵ In the era of the “new normal”²³⁶ of Singapore politics, following the PAP’s lowest vote share since 1965 and the loss of six parliamentary seats to the WP in the 2011 general election,²³⁷ and Prime Minister Lee Hsien Loong’s call for a “national conversation”²³⁸ about the nation’s future, it will be interesting to see if there will be a policy shift towards greater solicitude for human rights.

Has the rule of law’s formal conception outlived its usefulness? Paul Craig has observed that “the adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory of justice which imbues such an account of law”.²³⁹ Thus, it might be argued that the rule of law is more useful as a legal principle if confined to a thin conception. If it is to be argued that laws and government policies should comply with any substantive standards of democracy and human rights, then the standards should be articulated distinctly and not wrapped up within the concept of the rule of law.

Conversely, adopting a thin conception of the rule of law means that a particular jurisdiction might have laws and policies that breach widely accepted standards of democracy and human rights, but yet be able to claim that it is fully compliant with the rule of law because its laws and policies are comprehensible, stable, made public, and

²³⁵ Rudyard Kipling, “The Ballad of East and West”, first published in *Macmillan’s Magazine* (December 1889) and subsequently reprinted in *Barrack-Room Ballads and Other Verses* (London: Methuen, 1892).

²³⁶ Aaron Low, “Post-GE Politics is the New Normal: Tony Tan” *The Straits Times* (16 July 2011); Lydia Lim, “One Year after GE 2011: Whither the New Normal in Politics?” *The Straits Times* (5 May 2012).

²³⁷ “81–6: Workers’ Party wins Aljunied GRC; PAP vote share dips to 60.1%” *The Sunday Times* (8 May 2011) at 1, 4.

²³⁸ Lee Hsien Loong, “Prime Minister Lee Hsien Loong’s National Day Rally 2012 (Speech in English): ‘A Home with Hope and Heart’” (26 August 2012), online: Prime Minister’s Office <http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesinterviews/primeminister/2012/August/prime_minister_leehsienloongnationaldayrally2012speechinenglish.html> (last accessed: 3 October 2012; archived at <<http://www.webcitation.org/6B8RHfreo>>); Lydia Lim, “Help Write the Next Chapter in S’pore Story, Says PM” *The Straits Times* (27 August 2012).

²³⁹ Craig, *supra* note 10 at 487.

so on. It is often pointed out that the Nazi regime in Germany systematically stripped Jews of their civil liberties largely through legal means, including the Nuremberg Laws.²⁴⁰ Such grossly discriminatory laws satisfy the rule of law in its formal sense,²⁴¹ but applying the term in this context tarnishes the doctrine as a whole.²⁴²

I have much sympathy for the latter view, and submit that there is no reason why a substantive conception of the rule of law is necessarily more opaque than a formal conception. Of course, the standard of human rights protection embodied in the rule of law conception must be articulated. As Craig put it, if criticism of governmental action “is posited upon the substantive conception of the rule of law then intellectual honesty requires that this is made clear, and it also demands clarity as to the particular theory of justice which informs the critique”.²⁴³ Yet, so long as the obligation to safeguard human rights is acknowledged, it is not so important whether this should be regarded as distinct from the rule of law doctrine or an inseparable part of it. The crucial thing is that the rule of law, as a foundational constitutional principle, should not be used as hollow rhetoric to obscure the real issues.

²⁴⁰ J.H.H. Weiler, “The Political and Legal Culture of European Integration: An Exploratory Essay” (2011) 9 Int’l. J. Const. L. 678 at 686, 687.

²⁴¹ “In effect, the process was achieved through, and with full respect for, the rule of law”: *ibid.* at 687.

²⁴² “The argument about the rule of law I am trying to make is that formalist, positivist, and Kelsenian models are no longer accepted as representing meaningful and normatively acceptable forms of the rule of law, if not respectful of two conditions: rootedness in a democratic process of lawmaking and respectful of fundamental human rights”: *ibid.* at 691.

²⁴³ Craig, *supra* note 10 at 487.