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FOREIGN PRECEDENTS IN CONSTITUTIONAL ADJUDICATION BY THE SUPREME COURT OF SINGAPORE, 1963–2013

Jack Tsen-Ta Lee[†]

Abstract: This article surveys the use of foreign precedents in constitutional adjudication by the Supreme Court of Singapore for over half of a century during the terms of the first three Chief Justices—Wee Chong Jin (1963–1990), Yong Pung How (1990–2006), and Chan Sek Keong (2006–2012)—and the first year in office of the fourth Chief Justice, Sundaresh Menon (2012–2013). It concludes that while judges have always cited foreign case law, they have only actually applied foreign cases where the wording of the Constitution and the constitutional arrangements in Singapore are fairly analogous to the constitutional texts and arrangements upon which the cases were decided. Sometimes, Singapore judges quoted passages from cases in an instrumental manner to support statements of law without necessarily analyzing in detail the reasoning underlying such cases. There were also instances where foreign jurisprudence was rejected on the basis that it related to constitutional texts that were worded differently from the Constitution. In recent times the courts have been more willing to examine why foreign courts arrived at certain results, but this has not necessarily led them to adopt the same conclusions that those courts reached. It is likely that the courts' choice of which foreign precedents are followed or rejected will depend on whether they remain deferential to the policy choices of the political branches of government, or develop constitutional principles to subject these choices to greater scrutiny.

On November 6, 2012, Sundaresh Menon became the fourth Chief Justice of Singapore since the nation gained independence from the United Kingdom in 1963 and became a state of the Federation of Malaysia. Although Singapore was to leave Malaysia two years later in 1965 to become a wholly independent republic, 1963 remains significant as the year in which the fundamental liberties guaranteed by the Malaysian Constitution were extended to Singapore. For the first time, it became possible for the courts to strike down executive action and legislation inconsistent with these rights, a power they continue to possess today. As 2013 marked the 50th anniversary of these momentous events, it is apposite to assess how the Supreme Court has carried out constitutional adjudication during the terms of the first three Chief Justices—Wee Chong Jin (January 5, 1963 – September 27, 1990), Yong Pung How (September 28, 1990 – April 10,

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2006) and Chan Sek Keong (April 11, 2006 – November 5, 2012)—and the first year in office of Sundaresh Menon.

Specifically, this article examines how the courts have engaged with foreign jurisprudence—that is, judgments from courts of other jurisdictions and international courts such as the European Court of Human Rights. It approaches the question by first explaining the framework for constitutional adjudication in Singapore, then by reviewing the use of foreign precedents in such adjudication. Finally, it offers some conclusions on the role that foreign precedents have played. The aim is to try and gauge whether the Singapore courts are engaged in a transjudicial dialogue—i.e. when “performing their adjudicatory functions [and] find[ing] inspiration in foreign case law, [whether they are] engaging in a conversation with other judges worldwide.”¹

I. THE FRAMEWORK FOR CONSTITUTIONAL ADJUDICATION

In order to appreciate the Singapore courts’ role in interpreting and applying the Constitution of the Republic of Singapore,² the framework for constitutional adjudication is briefly described here. Following World War II, Singapore was a Crown colony and then a self-governing state of the United Kingdom.³ Singapore then left the British Empire by becoming a state of the Federation of Malaysia on September 16, 1963. It was also during this time that a bill of rights—Part II of the Malaysian Federal Constitution, entitled “Fundamental Liberties”⁴—first became applicable to Singapore. The Constitution of the State of Singapore⁵ (the “1963 State Constitution”) itself lacked such a recitation of rights. However, merger with Malaysia was short-lived, and Singapore became an independent republic on August 9, 1965. The Parliament of Singapore cobbled together a constitution from the 1963 State Constitution, certain provisions of the Malaysian Constitution (which were made applicable by the Republic of

¹ Tania Groppi & Marie-Claire Ponthoreau, *Introduction: The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 1, 1 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

² Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

³ As a Crown colony from 1955 onwards, a Governor headed Singapore, and its Legislative Council consisted of members both appointed by the United Kingdom government and elected by the people. After becoming a self-governing state in 1959, Singapore gained a wholly elected Legislative Assembly led by a Prime Minister and his Cabinet. C[ONSTANCE] M[ARY] TURNBULL, *A HISTORY OF MODERN SINGAPORE 1819–2005* 244–45, 268–69 (2009).

⁴ Federal Constitution (Malay.).

⁵ Sabah, Sarawak and Singapore (State Constitutions) Order in Council, 1963, S.I. 1963/1493 (U.K.) (containing the Constitution of the State of Singapore (1963)).

Singapore Independence Act 1965),⁶ and the latter Act itself.⁷ The fundamental liberties clauses were among the provisions imported from Malaysia at this time.⁸

Two provisions of the 1963 State Constitution that became part of the Constitution of the Republic of Singapore⁹ merit particular mention. Article 52 of the 1963 State Constitution, which was reworded and renumbered as Article 4 of the present Constitution, states: “This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”¹⁰ Article 105(1) of the 1963 State Constitution is now Article 162 of the present Constitution, and reads as follows:

Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.¹¹

Together, these provisions emphasize the supremacy of the Constitution over ordinary legislation inconsistent with it. Article 162 makes laws that existed before August 9, 1965¹² continue in force after Singapore’s independence, but requires them to conform with the

⁶ Republic of Singapore Independence Act (Act 9 of 1965) s 6(1) [hereinafter RISA]. The RISA was passed on Dec. 22, 1965, and made retrospective to August 9, 1965.

⁷ Kevin Tan Yew Lee, *The Evolution of Singapore’s Modern Constitution: Developments from 1945 to the Present Day*, 1 SING. ACAD. L. J. 1, 17 (1989). The RISA appears in form to be an ordinary statute enacted by Parliament, but the High Court regarded it as part of the Singapore Constitution. *Vellama d/o Marie Muthu v. Attorney-General* [2012] 4 SLR 698 at [111].

⁸ Note that the RISA omitted the right to property guaranteed by Article 13 of the Malaysian Constitution. Republic of Singapore Independence Act (Act 9 of 1965) s 6(3). This was to ensure the constitutionality of the Land Acquisition Act (Cap 152, 1985 Rev Ed), which would be enacted the following year. See *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at cols 435-36 (Lee Kuan Yew, Prime Minister). At the time, the Act empowered the Government to compulsorily acquire private land for public purposes without providing persons interested in the land with compensation at the prevailing market rate. Compensation was adjusted to the market rate in 2007. See Bryan Chew et al., *Compulsory Acquisition of Land in Singapore: A Fair Regime?*, 22 SING. ACAD. L. J. 166, 167 (2010).

⁹ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

¹⁰ *Id.* at Art 4.

¹¹ *Id.* at Art 162.

¹² *Id.* at Art 2(1) (definition of the word “commencement”).

Constitution by being “construed . . . with such modifications, adaptations, qualifications and exceptions as may be necessary.” Article 4 states that laws enacted after August 9, 1965 that are inconsistent with the Constitution are void. Read in the light of Article 162, this appears to suggest that laws enacted before that date are not wholly invalid but need only be construed in line with the Constitution. However, in *Tan Eng Hong v. Public Prosecutor*,¹³ the Court of Appeal, Singapore’s highest court, held that, on a purposive interpretation of Articles 4 and 162, legislation enacted before August 9, 1965 that infringes upon the Constitution is also of no effect.¹⁴

The Constitution does not specify which organ of state is generally responsible for determining the constitutionality of executive action or legislation. Soon after the Federation of Malaya gained its independence from the British in 1957, the power to do so was implicitly asserted by its courts.¹⁵ This exercise of judicial review continued when Singapore joined the Federation in 1963 and subsequently achieved full independence in 1965.¹⁶ In 2011, the Court of Appeal reaffirmed that, because the Constitution vests judicial power in the Supreme Court,¹⁷ it has “jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual.”¹⁸ This conclusion makes it

¹³ *Tan Eng Hong v. Public Prosecutor* [2012] 4 SLR 476 (CA) (Sing.).

¹⁴ *Id.* at [506].

¹⁵ *Chia Khin Sze v. The Mentri Besar, State of Selangor* [1958] 1 M.L.J. 105 (Malay.) (addressing whether the right to counsel guaranteed by Article 5(3) of the Constitution applies to inquiries held pursuant to the Restricted Residence Enactment of 1933, Act 377 (Federated Malay States)); *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 M.L.J. 169, 322 (P.C.) (appeal taken from Malay.) (issue of whether appellant’s dismissal from the police force by the Commissioner of Police was invalid because it was not effected by the Police Service Commission depended on whether provisions of the Police Ordinance 1952, Ordinance 14 (Federation of Malaya), were inconsistent with Articles 135(1) and 144(1) of the Constitution). See also S. Jayakumar, *Constitutional Limitations on Legislative Power in Malaysia*, 4(1) MALAYA L. REV. 96, 97 (1967) (“The ‘supremacy’ of the Constitution is effected by giving the Courts the power to review governmental actions which violate these limits.”).

¹⁶ See, e.g., *Osman v. Public Prosecutor* [1968–1970] SLR(R) 117 at [16–24] (PC) (appeal taken from Sing.) (The Privy Council, then Singapore’s final appellate court, was called upon to assess the constitutionality of the Emergency (Essential Powers) Act of 1964 (Malay.).

¹⁷ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 93 (“The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.”).

¹⁸ *Yong Vui Kong v. Attorney-General* [2011] 2 SLR 1189 at [31] (CA) (Sing.) [hereinafter *Yong Vui Kong v. A.G.*]. See also *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 at [50] (Sing.) (“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.”); *Public Prosecutor v. Tan Cheng Kong* [1998] 2 SLR(R) 410 at [89] (CA) (Sing.) (“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.”); *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 SLR 947 at [14] (CA) (Sing.) (The nation’s Westminster-model legal system “is based

clear that the duty of securing observance of the Constitution by the political branches of government falls upon the courts as an aspect of judicial power, and is analogous to rulings in other jurisdictions such as the seminal judgment of the U.S. Supreme Court in *Marbury v. Madison*.¹⁹

Until April 8, 1994,²⁰ the Judicial Committee of the Privy Council based in the United Kingdom was Singapore's final appellate court²¹ and the ultimate interpreter of the Constitution. Today, primary responsibility for interpreting and enforcing the Constitution lies with the Supreme Court, which has two divisions: the Court of Appeal, which is Singapore's final appellate court; and the High Court, which exercises original jurisdiction in weighty matters.²² The High Court has suggested that "[w]here questions of law have already been decided or principles relating to an article in the Constitution have been set out by the superior courts, a subordinate court . . . should proceed to apply the relevant case law or extrapolate from the principles enunciated to reach a proper conclusion on the facts before it."²³ Thus, the State Courts—the lower courts in Singapore—are confined to issuing declarations as to constitutionality;²⁴ they possess no power to exercise supervisory jurisdiction over tribunals or public authorities, judicially review the acts or decisions of any persons or authorities, or issue prerogative orders.²⁵ Only the High Court may do so.²⁶ As in the United Kingdom, constitutional issues are dealt with by the ordinary hierarchy of

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.”)

¹⁹ 5 U.S. 137, 176-78 (1803).

²⁰ Supreme Court of Judicature (Amendment) Act (Act 16 of 1993) (Sing.); Constitution of the Republic of Singapore (Amendment) Act (Act 17 of 1993) (Sing.); Judicial Committee (Repeal) Act (Act 2 of 1994) (Sing.). Appeals to the Privy Council had been restricted from 1989. Appeals were only possible in civil cases if all the parties to the proceedings consented, and in criminal matters where the death penalty had been imposed but the Court of Criminal Appeal's decision had not been unanimous. Judicial Committee (Amendment) Act (Act 21 of 1989) (Sing.).

²¹ Judicial Committee Act (Act 37 of 1966) (Sing.); Constitution (Amendment) Act (Act 19 of 1969) (Sing.).

²² The High Court's original jurisdiction is unlimited, but if a party commences an action in the High Court without a proper reason and only succeeds in recovering a sum which could have been sued for in a Subordinate Court, he or she will only be awarded costs on the State Courts scale. State Courts Act (Cap 321, 2007 Rev Ed) s 39.

²³ *Johari bin Kanadi v. Public Prosecutor* [2008] 3 SLR(R) 422 at [9] (Sing.).

²⁴ State Courts Act (Cap 321, 2007 Rev Ed) s 31(2)(b) (Dist. Cts.) and s 52(1B)(b)(ii) (Magis. Cts.).

²⁵ *Id.* at s 19(3)(a)–(b) (Dist. Cts.) and s 52(2) (Magis. Cts.). The prerogative orders are the mandatory order (formerly known as “mandamus”), prohibiting order (“prohibition”), quashing order (“certiorari”), and order for review of detention (“habeas corpus”). *Id.* at s 19(3)(b).

²⁶ Regarding the High Court's inherent supervisory jurisdiction, see *Ng Chye Huey v. Public Prosecutor* [2007] 2 SLR(R) 106 at [49, 53] (CA) (Sing.); regarding its power to issue prerogative orders, see the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18(2).

courts, which also deal with private law matters, rather than by a specialized constitutional court.²⁷

The independence of the Supreme Court judges to exercise judicial power, including constitutional judicial review, is generally safeguarded by provisions in Part VIII of the Constitution.²⁸ These include prohibitions against the offices of judges being abolished,²⁹ as well as their remuneration and other terms of office being altered to their disadvantage after appointment,³⁰ tenure until the age of 65 years,³¹ a stringent process for removing a judge from his or her office,³² and requiring no less than a quarter of the total number of Members of Parliament to give notice of a substantive motion before a judge's conduct can be discussed in Parliament.³³

The foregoing description shows that Singapore's legal system has features similar to those of many common law jurisdictions. Notably, it possesses a written constitution containing a bill of rights, and its courts have asserted a duty to strike down ordinary legislation that infringes upon the Constitution. Since some of these other jurisdictions routinely refer to foreign precedents when engaging in constitutional adjudication, it is interesting to assess the extent to which the Singapore courts do so as well.

I. FOREIGN PRECEDENTS IN CONSTITUTIONAL ADJUDICATION

A. *Methodology*

To examine the role of foreign precedents in constitutional adjudication in Singapore, reported and unreported constitutional cases decided between September 16, 1963 and December 31, 2013 that were

²⁷ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 100(1) provides that the President may refer to a tribunal of not less than three Supreme Court judges for its opinion on "any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise." However, the President's discretion to refer such matters must be exercised in accordance with the advice of the Cabinet or a minister acting under the Cabinet's general authority. *Id.* Art 21(1). In this respect, the President has no power to exercise personal discretion or act against the Cabinet's advice. *Cf. Yong Vui Kong v. A.G.* [2011] 2 SLR 1189 at [157, 180] (CA) (Sing.). Thus, persons may not have constitutional questions referred by the President to the Constitution of the Republic of Singapore Tribunal as a matter of right.

²⁸ See generally Michael Hor, *The Independence of the Criminal Justice System in Singapore*, 2002 SING. J. LEGAL STUD. 497; Chan Sek Keong, *Securing and Maintaining Judicial Independence*, 22 SING. ACAD. L.J. 229 (2010).

²⁹ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 95(3).

³⁰ *Id.* at Art 98(8).

³¹ *Id.* at Art 98(1).

³² *Id.* at Art 98(2)-(5).

³³ *Id.* at Art 99.

available on LawNet, a subscription-based online database, were examined.³⁴ These included judgments of the Privy Council hearing appeals from Singapore, as well as judgments of the upper and lower divisions of the Supreme Court of Singapore—the Court of Appeal and the High Court.³⁵ These judgments were reported in various series of law reports, which are described below.

Between 1963 and 1991, selected judgments of the Privy Council, the Court of Appeal and the High Court were reported in the *Malaya Law Journal* (“M.L.J.”).³⁶ From 1992, this task was assumed by the *Singapore Law Reports* (“S.L.R.”), which were published by Butterworths Asia on the authority of the Singapore Academy of Law (“S.A.L.”). In 1996, Butterworths reproduced Singapore judgments that had appeared in the M.L.J. between 1965 and 1991 in a series of S.L.R. volumes. Having formed a Council of Law Reporting, the Academy took over responsibility for publishing the law reports in 2003, and in 2010, reissued the 1965–2010 judgments that had appeared in the S.L.R. in a series called the *Singapore Law Reports (Reissue)* (“S.L.R.(R.)”).³⁷ As the courts require judgments in the S.L.R.(R.) to be cited in preference to those in the S.L.R.,³⁸ judgments published in the S.L.R.(R.) from August 9, 1965 to December 31, 2010, which are available on LawNet, were used. Judgments in the M.L.J. were consulted for the period of September 16, 1963 to August 8, 1965, and those in the S.L.R. for the period of January 1, 2011 to December 31, 2013. LawNet also contains unreported judgments, but only has a consistent set of these starting from the 2000s. Earlier judgments are archived by the Registry of the Supreme Court, but as these have not been digitized and

³⁴ LawNet, which is managed by the Singapore Academy of Law, contains, among other things, reported and unreported judgments of the Supreme Court and State Courts, judgments from courts of other countries such as Malaysia and the United Kingdom, journal articles, and textbooks. LAWNET, www.lawnet.com.sg (last visited Mar. 7, 2015).

³⁵ From colonial times until 1993, Singapore had a separate Court of Appeal (which dealt with civil appeals) and Court of Criminal Appeal. The system of having two appellate courts was confirmed after Singapore’s independence by the Supreme Court of Judicature Act (Act 24 of 1969), and was eventually replaced by the present unitary Court of Appeal through the enactment of the Supreme Court of Judicature (Amendment) Act (Act 16 of 1993) and the Constitution of the Republic of Singapore (Amendment) Act (Act 17 of 1993). See Kevin Tan Yew Lee, *A Short Legal and Constitutional History of Singapore*, in THE SINGAPORE LEGAL SYSTEM 26, 40, 51–52 (Kevin Y[ew] L[ee] Tan ed., 2d ed. 1999 (2003 reprint)). In this article, in regard to the period prior to when the unitary Court of Appeal was established, the term “Court of Appeal” refers to the Court of Criminal Appeal as well.

³⁶ In fact, the *Malayan Law Journal* published cases originating from Singapore beginning in 1932. See G. W. Bartholomew & Kevin Y[ew] L[ee] Tan, *A History of Law Reporting*, in ESSAYS IN SINGAPORE LEGAL HISTORY 139, 152 (Kevin Y[ew] L[ee] Tan ed., 2005).

³⁷ *Id.* at 154-56; *Law Reporting*, SINGAPORE ACADEMY OF LAW, http://www.sal.org.sg/content/LK_law_reporting.aspx (last visited Feb. 22, 2015).

³⁸ *Supreme Court Practice Directions*, para. 74(6), https://www.supremecourt.gov.sg/data/doc/ManagePage/98/ePD_WebHelp/ePD.htm (last visited Mar. 7, 2015).

uploaded to LawNet, there is presently no convenient way to access or assess them. Thus, such judgments were not considered for this article.

Cases were regarded as ‘constitutional’ if they involved the application of provisions of the Constitution. In each judgment, the number of foreign precedents cited by judges in the course of constitutional adjudication was counted, except for foreign precedents mentioned in quotations which were disregarded. A court was treated as having engaged in constitutional adjudication if it considered the meaning of a constitutional provision, applied such a provision to a factual scenario, or dealt with procedural issues relevant to constitutional law, such as standing (*locus standi*) or remedies. By the same token, foreign precedents cited in portions of judgments concerning other matters (for example, issues of criminal law or private law) were ignored. Finally, given space constraints, only cases regarded as particularly illustrative of the courts’ trends in referring to foreign precedents were selected for discussion in this article.

B. Findings

1. Number of Constitutional Judgments

Using the methodology described above, the study found 153 cases between 1963 and 2013 that qualified as ‘constitutional cases’ for this analysis, averaging 3.06 cases each year.³⁹ This is a small number considering that during the nine-year period between 2000 and 2008, the High Court of Australia decided 193 constitutional cases (21.44 cases per year),⁴⁰ and in the 29 years between 1982 and 2010, the Supreme Court of Canada determined 949 of such cases (32.72 cases per year).⁴¹ Undoubtedly, the fact that Singapore’s population—5,399,200 as of June 2013⁴²—is much smaller than that of Australia and Canada has an impact on the number of cases brought before its courts. However, population does not appear to be strictly determinative of constitutional litigation rates. In Ireland, which has

³⁹ To calculate this figure, the number of 153 constitutional cases was divided by 50 years. However, to be precise, the period from September 16, 1963 to December 31, 2013 is 50 years, 3 months, and 15 days.

⁴⁰ Cheryl Saunders & Adrienne Stone, *Reference to Foreign Precedents by the Australian High Court: A Matter of Method*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 23 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013)

⁴¹ Gianluca Gentili, *Canada: Protecting Rights in a ‘Worldwide Rights Culture’: An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982–2010)*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 53, table 1 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

⁴² NATIONAL POPULATION AND TALENT DIVISION, PRIME MINISTER’S OFFICE ET AL., *POPULATION IN BRIEF 2013 4-5* (2013), available at www.nptd.gov.sg/portals/0/news/population-in-brief-2013.pdf.

an estimated population of 4,593,100 as of April 2013,⁴³ the Supreme Court decided 902 constitutional cases over the 74-year period between 1937 and 2010 (12.19 cases per year).⁴⁴ At this point, we can only speculate about the reasons for the low number of constitutional cases in Singapore. It may be that Singaporeans are generally less litigious than nationals of other countries, and that they are particularly reluctant to take legal action against public authorities for fear that doing so will trigger some form of backlash in future dealings with the authorities.

The low success rate of constitutional claims may also be a factor. In the 50 years since 1963, there have only been three cases in which the courts held that the government's interpretation of constitutional provisions was incorrect. The 1988 case of *Chng Suan Tze v. Minister for Home Affairs*⁴⁵ concerned whether certain provisions in the Internal Security Act ("ISA")⁴⁶ should be interpreted as conferring on the Minister a subjective or objective discretion. The Act empowers the Minister for Home Affairs to detain without trial persons believed to pose a national security risk, and to suspend and revoke the suspension of such detention orders. The Court of Appeal held that construing the Minister's discretion as subjective would, among other things, violate the guarantee of equal protection in Article 12(1) of the Constitution,⁴⁷ and the vesting of judicial power in the courts by Article 93.⁴⁸ However, the remarks were *obiter dicta*, and Parliament swiftly neutralized any potential legal effect by means of amendments to the Constitution and the ISA, which came into effect less than two months after the judgment was handed down.⁴⁹ About a decade later in 1998, the High Court ruled in *Taw Cheng Kong v. Public Prosecutor*⁵⁰ that one of the sections of the Prevention of Corruption Act⁵¹ infringed Article 12(1). This decision was overturned by the Court of Appeal.⁵² Most recently, in 2013, the Court of Appeal

⁴³ *Population and Migration Estimates: April 2013*, CENTRAL STATISTICS OFFICE, <http://www.cso.ie/en/releasesandpublications/er/pme/populationandmigrationestimatesapril2013/> (last visited Mar. 7, 2015).

⁴⁴ Cristina Fasone, *The Supreme Court of Ireland and the Use of Foreign Precedents: The Value of Constitutional History*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 116 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

⁴⁵ *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA) (Sing.).

⁴⁶ Internal Security Act (Cap 143, 1985 Rev Ed).

⁴⁷ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 12(1) ("All persons are equal before the law and entitled to the equal protection of the law.").

⁴⁸ *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 at [79-82] (CA) (Sing.).

⁴⁹ Constitution of the Republic of Singapore (Amendment) Act (Act 1 of 1989); Internal Security (Amendment) Act (Act 2 of 1989).

⁵⁰ *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SLR(R) 78 (Sing.).

⁵¹ Prevention of Corruption Act (Cap. 241, 1993 Rev. Ed.).

⁵² *Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA) (Sing.).

determined in *Vellama d/o Marie Muthu v. Attorney-General*⁵³ that the Government's interpretation of Article 49(1) of the Constitution was incorrect. This provision reads as follows:

Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.⁵⁴

The Government asserted that the provision conferred upon it the discretion to decide that a by-election need not be held to fill a casual vacancy that arises in Parliament, and that it is permissible to leave the seat vacant until the next general election. While the High Court agreed with this interpretation,⁵⁵ the Court of Appeal did not.⁵⁶ Ultimately, though, its view on the matter was obiter, as it also found that the appellant lacked standing by the time the appeal was heard—the by-election in question had already been called and concluded.⁵⁷

Nevertheless, as Figure 1 below shows, there appears to be a broad trend towards more constitutional cases being brought. The increase began in 1987 when six judgments were rendered; before that, there were no more than four judgments a year. Since then, the number of constitutional judgments has fluctuated. There have been periods such as 1991–1995, 1999–2004, and 2007–2010 (except 2008) when the number of judgments has fallen—in fact, no judgments were rendered in 1993 and 2002. However, in between those fallow periods the number of judgments rebounded, reaching highs in 2006 (nine judgments) and 2012 (13 judgments).

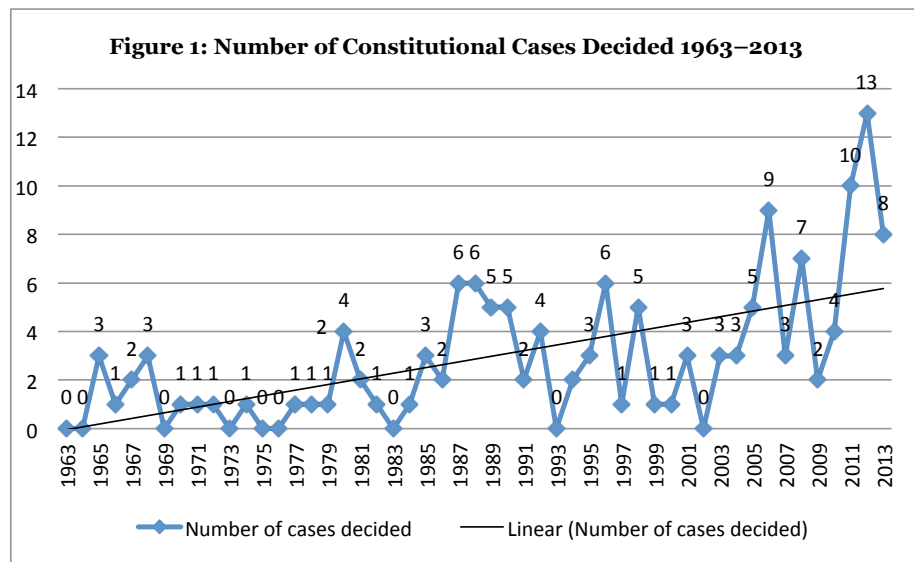
⁵³ *Vellama d/o Marie Muthu v. Attorney-General* [2013] 4 SLR 1 (CA) (Sing.).

⁵⁴ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 49(1).

⁵⁵ *Vellama d/o Marie Muthu v. Attorney-General* [2012] 4 SLR 698 (Sing.).

⁵⁶ *Vellama d/o Marie Muthu v. Attorney-General* [2013] 4 SLR 1 at [54-82] (CA) (Sing.).

⁵⁷ *See id.* at [11-44].



It is hard to be definitive about the reasons for the trend. There does not appear to be any common thread linking the six judgments decided in 1987. However, five of the judgments issued between 1988 and 1990 relate to habeas corpus applications challenging the legality of detentions under the ISA resulting from Operation Spectrum.⁵⁸ This was a security operation launched by the Internal Security Department of the Ministry of Home Affairs in 1987 against persons said to have been 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.”⁵⁹ Such allegations were rejected by the detainees.⁶⁰ Similarly, a number of the judgments issued between 1996 and 1998 result from action having been taken against Jehovah’s Witnesses for membership in an unlawful society,⁶¹ possession of unlawful publications,⁶² and refusing to

⁵⁸ *De Souza Kevin Desmond and others v. Minister for Home Affairs* [1988] 1 SLR(R) 464 (Sing.); *Teo Soh Lung v. Minister for Home Affairs* [1988] 2 SLR(R) 30 (Sing.); *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 (Sing.); *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 SLR(R) 461 (Sing.); *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 SLR(R) 347 (CA) (Sing.); *Cheng Vincent v. Minister for Home Affairs* [1990] 1 SLR(R) 38 (Sing.).

⁵⁹ *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 at [4] (Sing.).

⁶⁰ On the legal aspects of Operation Spectrum generally, see Jack Tsen-Ta Lee, *Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore*, 2012 SING. J. LEGAL STUD. 298, 307-13.

⁶¹ *Chan Cheow Kiang v. Public Prosecutor* [1996] 2 SLR(R) 620 (Sing.); *Kok Hoong Tan Dennis and others v. Public Prosecutor* [1996] 3 SLR(R) 570 (Sing.).

participate in a school ceremony involving the raising of the National Flag and recitation of the National Pledge.⁶³ Apart from these two lines of cases, there do not appear to be any overarching themes unifying the increased numbers of constitutional cases.

The general upturn in the number of constitutional judgments may also be partly attributable to an increasing awareness of rights and, thus, a willingness to challenge government policy through the courts. On September 1, 2000, the Government established Speakers' Corner at Hong Lim Park by exempting people wishing to speak at that venue from having to apply for a license under the Public Entertainments Act.⁶⁴ During a parliamentary debate on the subject, Minister for Home Affairs Wong Kan Seng said that although the Government had not initially favored the idea due to concerns over the "potential for public disorder in our multi-racial, multi-religious society," after further study, it felt that "the risk can be managed, and the idea is worth trying out, especially in view of the support it has attracted from civil society groups."⁶⁵ He commented, "[I]n the end, we thought that if that is really what the people want and we can manage the risk, we will provide for it. Basically, if the people really want this, we will let them try it out. We hope that they can make it succeed."⁶⁶ With effect from 2008, it became permissible to hold demonstrations at Speakers' Corner.⁶⁷ The venue has been used regularly for various events, including an annual LGBT event called Pink Dot SG⁶⁸ and a February 2013 protest against a white paper on population growth⁶⁹ issued by the Government.⁷⁰

⁶² *Chan Hiang Leng Colin and others v. Minister for Information and the Arts* [1996] 1 SLR(R) 294 (Sing.); *Liong Kok Keng v. Public Prosecutor* [1996] 2 SLR(R) 683 (Sing.).

⁶³ *Peter Williams Nappalli v. Institute of Technical Education* [1998] SGHC 351 (Sing.); *Nappalli Peter Williams v. Institute of Technical Education* [1998] 2 SLR(R) 529 (CA) (Sing.).

⁶⁴ Public Entertainments Act (Cap 257, 1985 Rev Ed). The exemption was originally effected by the Public Entertainments (Speakers' Corner) (Exemption) Order 2000 (G.N. No. S 364/2000), and at present by the Public Entertainments and Meetings (Speakers' Corner) (Exemption) (No. 2) Order 2011 (G.N. No. S 493/2011) and the Public Order (Unrestricted Area) (No. 2) Order 2011 (G.N. No. S 494/2011). For commentary, see Thio Li-ann, *Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society'*, 1(3) INT'L J. CONST. L. 516 (2003).

⁶⁵ *Singapore Parliamentary Debates, Official Report* (25 April 2000) vol 72 at col 21 (Wong Kan Seng, Minister for Home Affairs).

⁶⁶ *Id.* at col 25.

⁶⁷ Public Entertainments and Meetings (Speakers' Corner) (Exemption) Order 2008 (G.N. No. S 426/2008).

⁶⁸ First held in 2009; see Nur Dianah Suhaimi, *1,000 Turn Up in Pink at Event*, THE STRAITS TIMES (May 17, 2009), <http://news.asiaone.com/News/the+Straits+Times/Story/A1Story20090517-141933.html>; Sharanjit Leyl, *Singapore Gays in First Public Rally*, BBC NEWS (May 17, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8054402.stm>.

⁶⁹ NATIONAL POPULATION AND TALENT DIVISION, PRIME MINISTER'S OFFICE, POPULATION WHITE PAPER: A SUSTAINABLE POPULATION FOR A DYNAMIC SINGAPORE (2013).

The 2000s also saw the establishment of civil society organizations, such as the Humanitarian Organisation for Migration Economics (HOME), which works to counter human trafficking and labor exploitation,⁷¹ and MARUAH, a human rights non-governmental organization.⁷² On October 22, 2007, Nominated Member of Parliament Siew Kum Hong presented a public petition to Parliament calling for the repeal of section 377A of the Penal Code.⁷³ This section criminalizes acts of “gross indecency” between male persons in public or private places. The petition sought to repeal on the grounds that section 377A violates the guarantee of equality and equal protection in the Constitution.⁷⁴ Parliament debated the petition for two days during the Second Reading of a bill to overhaul the Penal Code, but a majority of the House ultimately voted to retain the provision in the Code.⁷⁵ Subsequently, high-profile legal suits challenged the constitutionality of section 377A.⁷⁶

Further challenges were also mounted to the Government’s assertion that it has discretion not to call a by-election to fill a casual vacancy in Parliament,⁷⁷ and its grant of a contingent loan of U.S. \$4 billion to the International Monetary Fund without the President’s concurrence.⁷⁸ It is submitted that the visibility of such cases, and the increasing opportunities for Singaporeans to express and share opinions freely at Speakers’ Corner and on the Internet, emboldens citizens. This, together with greater participation in activities organized by civil society groups, will cause them

⁷⁰ *4,000 Turn Up at Speakers’ Corner for Population White Paper Protest*, YAHOO! NEWS SINGAPORE (Feb. 16, 2013), <http://sg.news.yahoo.com/huge-turnout-at-speakers--corner-for-population-white-paper-protest-101051153.html>; Goh Chin Lian & Maryam Mokhtar, *White Paper Protest Draws Big Crowd*, THE STRAITS TIMES (Feb. 17, 2013), <https://sg.news.yahoo.com/huge-turnout-at-speakers--corner-for-population-white-paper-protest-101051153.html>.

⁷¹ Registered as a society under the Societies Act (Cap 311, 1985 Rev Ed), on September 6, 2004; see also *Mission & Vision*, HUMANITARIAN ORGANISATION FOR MIGRATION ECONOMICS, <http://home.org.sg/mission-vision/> (last visited Dec. 26, 2013).

⁷² Established in 2007; see Cassandra Chew, *Human Rights Group Maruah Gazetted as Political Body: Decision Means Group Can No Longer Accept Funding from Foreign Sources*, THE STRAITS TIMES (Nov. 12, 2010).

⁷³ Penal Code (Cap 224, 2008 Rev Ed) s 377A.

⁷⁴ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2121.

⁷⁵ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at cols 2125ff, 2354ff.

⁷⁶ *Tan Eng Hong v. Attorney-General* [2011] 3 SLR 320 (Sing.); *Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476 (CA) (Sing.) (standing); *Lim Meng Suang v. Attorney-General* [2013] 3 SLR 118 (Sing.); *Tan Eng Hong v. Attorney-General* [2013] 4 SLR 1059 (Sing.) (substantive issues); *Lim Meng Suang v. Attorney-General* [2015] 1 SLR 26 (CA) (Sing.).

⁷⁷ *Vellama d/o Marie Muthu v. Attorney-General* [2012] 2 SLR 1033 (Sing.) (leave to apply for a prerogative order); *Vellama d/o Marie Muthu v. Attorney-General* [2012] 4 SLR 698 (Sing.); *Vellama d/o Marie Muthu v. Attorney-General* [2013] 4 SLR 1 (CA) (Sing.) (substantive issues).

⁷⁸ *Jeyaretnam Kenneth Andrew v. Attorney-General* [2013] 1 SLR 619 (Sing.); *Jeyaretnam Kenneth Andrew v. Attorney-General* [2014] 1 SLR 345 (CA) (Sing.).

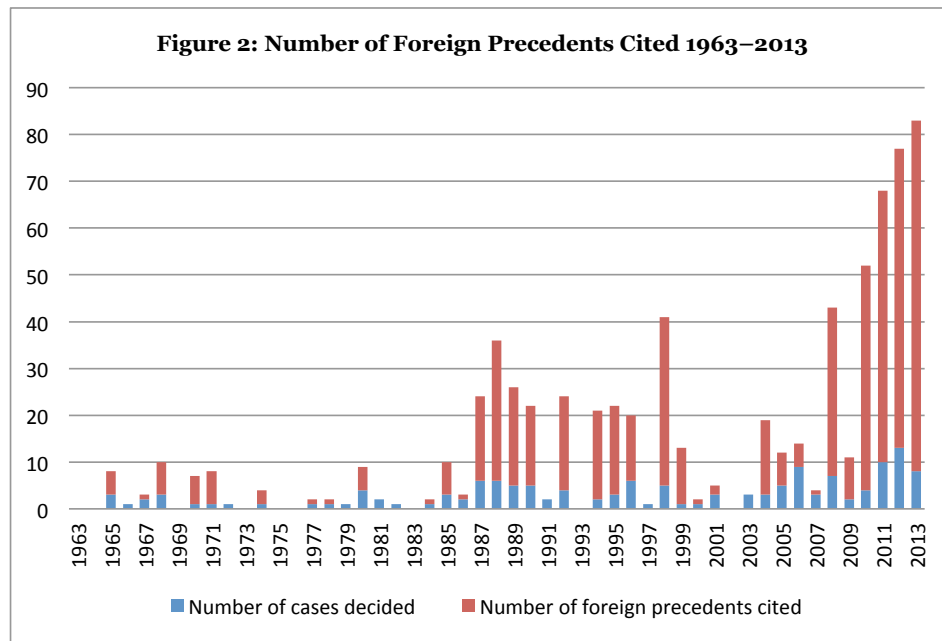
to continue to mature as a society, which may eventually lead to a continued increase in the number of constitutional cases each year.

2. *Citation of Foreign Precedents*

Since the start of constitutional adjudication in 1963, Singaporean courts have consistently referred to foreign case law. Reference to foreign precedents might be expected when a novel legal issue arises, or where it is thought desirable to test the local law against legal developments abroad.⁷⁹ Predictably, the number of foreign precedents cited tends to track the number of constitutional judgments delivered by the courts. As Figure 2 below shows, the increase in judgments between 1987 and 1990 was matched by a corresponding increase in the number of foreign precedents cited. Thereafter, the number of judgments held more or less steady until 1998, although there were drops in 1991, 1993, and 1997. Subsequently, there was a decline between 1999 and 2007. The numbers then began to pick up, reaching much higher levels than before in the years 2008 and 2010–2013, broadly corresponding to the growing quantity of judgments since 2006.

A selective examination of judgments from different periods suggests that Singapore courts have, on the whole, viewed foreign precedent with caution. On some occasions courts applied such precedent, and on others, courts either distinguished or declined to apply them. It appears that the courts took the latter route when the precedent did not comport with the judges' view of their role in constitutional adjudication.

⁷⁹ See, e.g., Goh Yihan & Paul Tan, *An Empirical Study on the Development of Singapore Law*, 23 SING. ACAD. L.J. 176, 194 (2011).



a. *1963–1990: Chief Justice Wee Chong Jin*

A fairly cautious approach towards the application of foreign precedent is evident even in the period from 1963 to 1993, the first thirty years of the bill of rights in Singapore. The courts were receptive to considering such precedent when related to the constitutional provisions of other jurisdictions with analogs to the Singapore Constitution; however, judges remained sensitive to textual differences. Administrative law rules and matters of constitutional practice such as habeas corpus and parliamentary procedure, inherited from the British, also provided a basis for examining and applying Commonwealth precedent.

For instance, in the 1971 judgment *Lee Mau Seng v. Minister for Home Affairs*,⁸⁰ Chief Justice Wee Chong Jin (“Wee C.J.”), sitting as a High Court judge, considered a U.S. case, *Johnson v. Zerbst*,⁸¹ and an Indian case, *V. Deshpande v. Emperor*.⁸² Wee C.J. reviewed these cases to determine if an individual detained without trial under the ISA was entitled to be released if he had been wrongfully denied his right to counsel guaranteed by Article

⁸⁰ *Lee Mau Seng v. Minister for Home Affairs* [1971–1973] SLR(R) 135 (Sing.).

⁸¹ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁸² *Vimlabai Deshpande v. King Emperor*, 1945 A.I.R. (Bom.) 8 (Ind.).

5(3) of the Constitution.⁸³ He distinguished *Johnson v. Zerbst* because the case stood for the principle that a federal court could only deprive an accused person of life or liberty if the individual had been accorded a Sixth Amendment right to counsel, unless the right had been waived. If the court had not complied with this prerequisite, the conviction was void and the imprisonment unlawful. If a retrial or appeal was no longer possible, the accused was thus entitled to be released from custody. In contrast, the Chief Justice held there was an established principle (presumably a common law one, though he cited no authority) that habeas corpus is not available as a remedy unless the detainee's detention is unlawful in some way, and he did not think it right to depart from that principle. In other words, in Singapore, an infringement of an accused person's right to counsel does not automatically render the detention unlawful.

Turning to *Deshpande*, Wee C.J. did not find the case useful as the Indian court provided no justification for ordering the immediate release of the detainee.⁸⁴ He went on to find that, despite the applicant's contentions, the detention in question was not illegal.

In holding the detention order valid, Wee C.J. cited *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia*.⁸⁵ There the Federal Court of Malaya held that the relevant legislation did not require the order to be in any particular form.⁸⁶ *Karam Singh* itself relied on decisions of the courts of the United Kingdom in *R. v. Secretary of State for Home Affairs, ex parte Lees*.⁸⁷ The Court determined that the order was not illegal because the grounds and factual allegations on which it was based were so vague and unintelligible that the detainee was unable to make adequate representations to the advisory board reviewing the detention.⁸⁸ In making this determination, the Chief Justice again distinguished the case from two judgments of the Supreme Court of India,⁸⁹ as the relevant provisions of the Indian Constitution were different from corresponding provisions of the Singapore Constitution. He noted that *Karam Singh*, referred to above, had reached the same conclusion,⁹⁰ and that holding

⁸³ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 9(3) (originally enacted as Art 5(3)).

⁸⁴ *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR(R) 135 at [18-22] (Sing.).

⁸⁵ *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129 (Fed. Ct.) (Malay.).

⁸⁶ *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR(R) 135 at [35] (Sing.).

⁸⁷ *Rex v. Secretary of State for Home Affairs ex parte Lees*, [1941] 1 K.B. 72 (Div. Ct.) (CA) (Eng. & Wales); see *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR(R) 135 at [36-40] (Sing.).

⁸⁸ *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR(R) 135 at [42-53] (Sing.).

⁸⁹ *State of Bombay v. Atma Ram Shridhar Vaidya*, 1951 A.I.R. S.C. 157 (India); *Dr. Ram Krishan Bhardwaj v. State of Delhi*, 1953 A.I.R. S.C. 318 (India).

⁹⁰ *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR(R) 135 at [42-53] (Sing.).

otherwise would be “wholly inconsistent with the scheme of the Act,” under which no judicial inquiry into the sufficiency of the grounds for detention was possible. This was a matter of subjective opinion for the President, acting upon the Cabinet’s advice.⁹¹

Interestingly, the Attorney-General in *Lee Mau Seng* attempted to persuade the High Court to adopt what Professor Sujit Choudhry has called a “genealogical interpretation” of the Constitution—an interpretation based on the notion that it is acceptable to import and apply doctrines developed from one constitution to another constitution if the two charters are linked by relationships of genealogy and history.⁹² The Attorney-General advocated that the Court apply a Malaysian Federal Court judgment.⁹³ The High Court regarded this authority as “unsettled and debatable,”⁹⁴ and ruled against the Attorney-General after determining the issue solely by examining the Singapore Constitution’s provisions.⁹⁵

Genealogical interpretation has been more readily accepted by courts in other cases, notably those relating to Article 12(1) of the Constitution, which states: “All persons are equal before the law and entitled to the equal protection of the law.” In *Kok Hoong Tan Dennis v. Public Prosecutor*,⁹⁶ the High Court applied a ‘rational relation’ test to Article 12(1), holding that an impugned legislative provision is constitutional only if it classifies people according to an intelligible differentia, and the differentia bears a rational relation to the object of the provision.⁹⁷ In reaching this decision, the court applied a Malaysian Federal Court of Criminal Appeal case, which had, in turn, followed a judgment of the Indian Supreme Court.⁹⁸

Genealogical interpretations, however, must be applied with circumspection. It may not be appropriate to assume that simply by adopting constitutional texts similar to the basic charters of other jurisdictions, the legislative body intended for all related foreign legal doctrines to be applied locally as well. The courts of a particular jurisdiction should always consider if foreign constitutional doctrines are able to shed

⁹¹ *Id.* at [54].

⁹² Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 838 (1999); Victor V. Ramraj, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT’L & COMP. L. 302, 311-12 (2002); see also Jack Tsen-Ta Lee, *Interpreting Bills of Rights: The Value of a Comparative Approach*, 5(1) INT’L J. CONST. L. 122, 129-30 (2007); *Lee Mau Seng v. Minister for Home Affairs* [1971–1973] SLR(R) 135 (Sing.)

⁹³ *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 M.L.J. 119 (Fed. Ct.) (Malay.).

⁹⁴ *Lee Mau Seng v. Minister for Home Affairs* [1971–1973] SLR(R) 135 at [30] (Sing.)

⁹⁵ *Id.* at [30-34].

⁹⁶ *Kok Hoong Tan Dennis v. Public Prosecutor*, [1996] 3 SLR(R) 570 (Sing.).

⁹⁷ *Id.* at [34].

⁹⁸ *Datuk Haji Harun bin Harun Idris v. Public Prosecutor* [1977] 2 M.L.J. 155 (Ct. of Crim. App.) (Malay.) (citing *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*, 1958 A.I.R. S.C. 538 (India)).

light on the provisions of the local bill of rights and contribute positively towards the development of their meaning.⁹⁹

In the 1988 case of *Times Publishing Bhd v. Sivadas*,¹⁰⁰ the issue was whether written submissions to a parliamentary select committee are absolutely privileged. In response to a notice issued by the Clerk of Parliament inviting members of the public to make representations on proposed changes to legislation regulating corporations, the defendant submitted written representations to the select committee.¹⁰¹ He was not invited to give oral evidence, but his representations were included in the committee's report to Parliament.¹⁰² The plaintiffs felt they had been libelled by the defendant's representations, and brought a defamation suit against him.¹⁰³ In contrast to *Lee Mau Seng*, where foreign precedents were referred to but not found to be of assistance, the High Court in *Times Publishing* cited with approval numerous cases from Australia and the United Kingdom¹⁰⁴ to interpret relevant provisions of the Parliament (Privileges, Immunities and Powers) Act,¹⁰⁵ which was enacted pursuant to Article 63 of the Constitution.¹⁰⁶ These cases were pertinent because section 3(1) of the Act states that "[t]he privileges, immunities and powers of Parliament and of the Speaker, Members and committees of Parliament shall be the same as those of the Commons House of Parliament of the United Kingdom and of its Speaker, Members or committees at the establishment of the Republic of Singapore." Article 49 of the Australian Constitution¹⁰⁷ is similar.¹⁰⁸ The Court found that the defendant's statements were absolutely privileged and could not form the basis of civil proceedings against him.¹⁰⁹

Later in 1988, the Court of Appeal embraced the approach taken in *Times Publishing* in the landmark judgment of *Chng Suan Tze*.¹¹⁰ Wee C.J. held that the United Kingdom cases applied in *Karam Singh*¹¹¹ could no longer be regarded as correct, as the law cannot countenance unfettered executive discretion. In doing so, he relied on decisions of the House of

⁹⁹ Lee, *supra* note 92.

¹⁰⁰ *Times Publishing Bhd v. Sivadas* [1988] 1 SLR(R) 572 (HC) (Sing.).

¹⁰¹ *Id.* at 574-75.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Times Publishing Bhd v. Sivadas* [1988] 1 SLR(R) 572 at [576-86] (HC) (Sing.).

¹⁰⁵ Parliament (Privileges, Immunities and Powers) Act (Cap 217, 2000 Rev Ed).

¹⁰⁶ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 63 ("It shall be lawful for the Legislature by law to determine and regulate the privileges, immunities or powers of Parliament.").

¹⁰⁷ AUSTRALIAN CONSTITUTION s 49.

¹⁰⁸ *Times Publishing Bhd v. Sivadas* [1988] 1 SLR(R) 572 at [581] (HC) (Sing.).

¹⁰⁹ *Id.* at [586-89].

¹¹⁰ *Supreme Court Practice Directions*, *supra* note 38.

¹¹¹ *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129 (Fed. Ct.) (Malay.).

Lords and the Privy Council on appeal from Ceylon, Malaysia and the West Indies Associated States, and from courts in South-West Africa and Zimbabwe.¹¹² Disapproving of his earlier ruling in *Lee Mau Seng*, he held that the authorities' discretion to detain without trial under the ISA should henceforth be regarded as objective rather than subjective, and thus open to judicial review.¹¹³

Shortly after the *Chng Suan Tze* judgment, the Singaporean Parliament issued a distinct rebuke to the Court by reinstating the law as it had been laid down in *Lee Mau Seng*. It inserted section 8B(1) into the ISA, which reads:

[T]he 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.¹¹⁴

Speaking in Parliament during the Second Reading of the related bill amending the Constitution, the Minister for Law characterized the approach of the British courts as “interventionist” and criticized their willingness to “ignore or disregard the clear intent of the statutory provisions and go behind the decisions of the Executive.”¹¹⁵ The Minister said that “if we do not restore the subjective test in *Lee Mau Seng*, and if we allow foreign case law and precedents to allow the courts to be involved in an interventionist role, then we will have an untenable position . . . because our law on national security matters will be governed by cases decided abroad, in countries where conditions are totally different from ours.”¹¹⁶

b. 1990–2006: Chief Justice Yong Pung How

Wee C.J. retired at the end of September 1990. During the term of his successor, Yong Pung How (“Yong C.J.”), the courts increasingly resisted

¹¹² *Id.*

¹¹³ *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 at [55-85, 139] (Sing.); see also Lee, *Shall the Twain Never Meet?*, *supra* note 60, at 309-10.

¹¹⁴ Internal Security Act (ISA) (Cap 143, 1985 Rev Ed) s 8B(1).

¹¹⁵ *Singapore Parliamentary Debates, Official Report* (25 January 1989) vol 52 at cols 467-68 (S. Jayakumar, Minister for Law).

¹¹⁶ *Id.*

applying foreign precedent. Particularly in the second half of Yong C.J.'s term, the numbers of such judgments cited tended to be comparatively low. It is tempting to conclude that the courts were simply taking their cue from the Government's dim view of the relevance of foreign jurisprudence,¹¹⁷ but there is no direct evidence of this. However, it is worth noting that up to 1991, the President appointed the Chief Justice and the judges of the Supreme Court and was obliged to follow the advice of the Prime Minister on the matter.¹¹⁸ In 1991, the Constitution was amended to make the President an office directly elected by the people, and he is now empowered to act in his personal discretion and disagree with the Prime Minister's choice of Supreme Court judges.¹¹⁹ Nonetheless, this has not resulted in any significant change to the Cabinet's ability to determine the composition of the Court. To date, the President has not exercised his veto power. In any case, if the President were to do so in the future, he would have to consult the Council of Presidential Advisers first.¹²⁰ If the President's refusal to make an appointment was contrary to the Council's recommendation, Parliament could overrule his decision by obtaining at least a two-thirds vote of all elected Members of Parliament.¹²¹ At present, such a vote is not difficult to achieve, as the ruling People's Action Party holds 80 out of the 87 elected seats in Parliament. This is not to say that persons nominated by the Cabinet for appointment as judges would inevitably be biased in favor of the Government's views. Chan Sek Keong, Singapore's third Chief Justice, has robustly defended judicial independence, writing:

[Independence from the Legislature means] that judges should not be adjudicating "with parliamentary approval or the avoidance of parliamentary reprobation in mind." It also means that judges should not be concerned about any adverse criticisms by Members of Parliament on the decisions of the courts affecting them or their party. Nor should judges be afraid to strike down Acts of Parliament which are inconsistent with the constitution With respect to the Executive, this

¹¹⁷ See, e.g., Arun K. Thiruvengadam, *Comparative Law and Constitutional Interpretation in Singapore: Insights from Constitutional Theory*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 114, 121 (Li-ann Thio & Kevin Y. L. Tan eds., 2009).

¹¹⁸ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 95(1)-(2) (Before tendering advice as to the appointment of Supreme Court judges other than the Chief Justice, the Prime Minister was required to consult the Chief Justice.).

¹¹⁹ *Id.* at Art 22(1)(a), 95(1).

¹²⁰ *Id.* at Art 21(3).

¹²¹ *Id.* at Art 22(2).

means, for one, that a judge should not tailor judicial decisions to ingratiate himself or herself with the Executive for whatever reason, be it for promotion or otherwise. The courts must also not shy away from exercising their power of judicial review to correct, and if necessary nullify, any executive act or decision which is contrary to its statutory powers for fear of executive reaction.¹²²

Nonetheless, it is reasonable to assume that the Prime Minister would naturally advise the President to appoint as judges women and men who generally share the Government's philosophy towards governance, rather than people who have publicly evinced an inclination to disagree with its policies. As this article later addresses, however, this does not explain the change in judicial approach beginning in 2006.

During the 1990–2006 period, constitutional cases saw a more skeptical analysis of foreign precedents. In particular, several litigants failed to convince the courts to adopt theories based on European and U.S. cases. In the 1992 case *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,¹²³ the appellant, an opposition politician, sought to rely on the common law defense of qualified privilege when sued for defamation by the then Prime Minister.¹²⁴ The appellant particularly emphasized¹²⁵ the U.S. Supreme Court's decision *New York Times v. Sullivan*¹²⁶ and that of the European Court of Human Rights in *Lingens v. Austria*.¹²⁷ He argued that Article 14(1)(a) of the Singaporean Constitution, which guarantees citizens the right to freedom of speech and expression,¹²⁸ required the qualified privilege defense to be modified if the statement relates to the conduct of public officials, even when the statement is publically made. The Court of Appeal declined to follow these decisions because “[t]he terms of Art 14 of our Constitution differ materially from the First and Fourteenth Amendments of the Constitution of the United States and also from Art 10 of the European

¹²² Chan Sek Keong, *Securing and Maintaining the Independence of the Court in Judicial Proceedings*, 22 SING. ACAD. L.J. 229, 242-43 (2010) (citations omitted).

¹²³ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 SLR(R) 791 (CA) (Sing.).

¹²⁴ *Id.* at [74-76] (citing *Blackshaw v. Lord*, [1984] Q.B. 1 (CA) (Eng.)) (Traditionally, a person may only rely on qualified privilege as a defense to the tort of defamation if (1) he or she is under a legal, moral, or social duty to make the impugned statement; and (2) it is made to people with a corresponding duty to receive it. In the absence of such a correspondence of duty, the defense does not apply to statements which are of general public interest.).

¹²⁵ *Id.* at [43].

¹²⁶ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹²⁷ *Lingens v. Austria*, 8 Eur. Ct. H.R. 407 (1986).

¹²⁸ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 14(1)(a) (“[E]very citizen of Singapore has the right to freedom of speech and expression.”).

Convention on Human Rights.”¹²⁹ The Court of Appeal noted that, unlike the First Amendment, Article 14 of the Singapore Constitution does not expressly prohibit the legislature from making laws abridging the freedom of speech or freedom of the press. The Court of Appeal also noted that Article 10(2) of the European Convention on Human Rights, which provides that the exercise of free speech is subject to “restrictions or penalties as are prescribed by law and are *necessary in a democratic society* . . . for the protection of the reputation or rights of others,”¹³⁰ is a phraseology that does not appear in Article 14 of the Singapore Constitution. Since Article 14(2)(a) merely states that “Parliament may by law impose . . . restrictions . . . to provide against . . . defamation,”¹³¹ Parliament may freely impose such restrictions on the right to freedom of speech as it sees fit. Parliament did so by providing for the continued application of the common law of defamation in Singapore following the nation’s independence in 1965.¹³² This approach has been criticized as excessively literal.¹³³

Despite the Court of Appeal’s decision in *Jeyaretnam* not to apply European and U.S. precedents, the Court appeared to act inconsistently in its adoption and rejection of foreign cases. The Court did not find the *New York Times* and *Lingens* judgments relevant. It did look to three Canadian cases to buttress its point that public officials are entitled to have their reputations protected by the law, and that any extension of the qualified privilege defense was undesirable.¹³⁴ These cases were delivered before the Canadian Charter of Rights and Freedoms¹³⁵ came into force;¹³⁶ the Court neither explained why it preferred these cases despite the lack of a rights-based context at the time they were decided, nor considered whether they would still be regarded by the Canadian courts as persuasive. It could be said that the Court adopted a “dialogical interpretation” of bills of rights, an

¹²⁹ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 SLR(R) 791 at [56] (CA) (Sing.).

¹³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (emphasis added).

¹³¹ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 14(2)(a) (“Parliament may by law impose—(a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence.”).

¹³² *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 SLR(R) 791 at [56-59] (CA) (Sing.).

¹³³ Michael Hor, *The Freedom of Speech and Defamation: Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, 1992 SING. J. LEGAL STUD. 542, 547-48 (1992).

¹³⁴ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 SLR(R) 791 at [62-65] (CA) (Sing.).

¹³⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

¹³⁶ See Thiruvengadam, *supra* note 117, at 121-22; see also Li-ann Thio, *Beyond the ‘Four Walls’ in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428, 472-74 (2006).

acceptable technique of constitutional adjudication.¹³⁷ In doing so, judges merely use foreign precedent “instrumentally, as a means to stimulate constitutional self-reflection,”¹³⁸ and do not make any normative claims based on foreign precedent.¹³⁹ However, applying precedent in this manner can too easily be misconstrued and can come across as cherry-picking if judges do not provide convincing reasons why they are rejecting modern lines of authority in favor of seemingly obsolete ones.¹⁴⁰

The Privy Council articulated a similar disdain for foreign jurisprudence in hearing an appeal from Singapore in 1980. In *Ong Ah Chuan v. Public Prosecutor*,¹⁴¹ their Lordships were called upon to consider whether the presumption of innocence is a fundamental human right protected by Article 9(1) of the Constitution, which states that “[n]o person shall be deprived of his life or personal liberty save in accordance with law,”¹⁴² and Article 12(1). They prefaced their discussion of the issue with the following statement:

These articles are among eight articles in Pt IV of the Constitution under the heading “Fundamental Liberties.” The eight articles are identical with similar provisions in the Constitution of Malaysia, but differ considerably in their language from and are much less compendious and detailed than those to be found in Pt III of the Constitution of India under the heading “Fundamental Rights.” They differ even more widely from those amendments to the Constitution of the United States of America which are often referred to as its Bill of Rights. In view of these differences their Lordships are of the opinion that decisions of Indian courts on Pt III of the Indian Constitution should be approached with caution as guides to the interpretation of individual articles in Pt IV of the Singapore Constitution; and that decisions of the Supreme Court of the United States on that country’s Bill of Rights, whose phraseology is now nearly 200 years old, are of little help in construing provisions of the Constitution of Singapore

¹³⁷ See Choudhry, *supra* note 92, at 836; Ramraj, *supra* note 92, at 313-17.

¹³⁸ Choudhry, *supra* note 92, at 892.

¹³⁹ Ramraj, *supra* note 92, at 315-16.

¹⁴⁰ See Lee, *supra* note 92, at 131-32.

¹⁴¹ *Ong Ah Chuan v. Public Prosecutor* [1979-1980] SLR(R) 710 (PC) (appeal taken from Sing.).

¹⁴² Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 9(1).

or other modern Commonwealth constitutions which follow broadly the Westminster model.¹⁴³

Regrettably, the court did not mention the Indian and U.S. decisions that might have had a bearing on the issue, and thus did not explain why they were thought to be unhelpful. This approach was abandoned by the Privy Council 200 decision in *Reyes v. The Queen*,¹⁴⁴ with their Lordships holding that “limited assistance” was to be gained from *Ong Ah Chuan* and another case because the decisions had been “made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was.”¹⁴⁵

The approach taken in *Ong Ah Chuan* and *Jeyaretnam* of disdaining certain lines of foreign jurisprudence was applied again in *Chan Hiang Leng Colin v. Public Prosecutor*.¹⁴⁶ The issue facing the High Court was whether administrative orders issued by the Government to deregister the Singapore Congregation of Jehovah’s Witnesses and ban works by publishing companies associated with the Jehovah’s Witnesses violated the right to freedom of religion as guaranteed by Article 15(1) of the Singapore Constitution.¹⁴⁷ To justify not referring to U.S. First Amendment cases when interpreting Article 15(1), Chief Justice Yong quoted the following sentence from a 1963 decision of the High Court of Malaya, *Government of the State of Kelantan v. Government of the Federation of Malaya*.¹⁴⁸ “[T]he Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.”¹⁴⁹ Scholars have called this approach the ‘four walls’ theory or the doctrine of constitutional adjudication.¹⁵⁰ The Chief Justice recognized that the First Amendment

¹⁴³ *Ong Ah Chuan v. Public Prosecutor* [1979–1980] SLR(R) 710 at [22] (PC) (appeal taken from Sing.).

¹⁴⁴ *Reyes v. The Queen*, [2002] 2 A.C. 235 (appeal taken from Belize).

¹⁴⁵ *Id.* at 257; see also *Watson v. The Queen*, [2005] 1 A.C. 472, 489 (appeal taken from Jam.).

¹⁴⁶ See generally *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 (HC) (Sing.).

¹⁴⁷ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 15(1) (“Every person has the right to profess and practise his religion and to propagate it.”).

¹⁴⁸ *Government of the State of Kelantan v. Government of the Federation of Malaya* [1963] M.L.J. 355, 358 (H.C.) (Malay.).

¹⁴⁹ *Id.* at 231.

¹⁵⁰ See Thiruvengadam, *supra* note 117, at 121; Thio Li-ann, *The Secular Trumps the Sacred: Constitutional Issues Arising from Colin Chan v Public Prosecutor*, 16 SING. L. REV. 26, 62 (1995); Thio Li-ann, *Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs*, 2002 SING. J. LEGAL STUD. 328, 347 (2002); Victor V. Ramraj, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT’L & COMP. L. 302, 302 (2002); Thio Li-ann, *Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore’s*

contains both an ‘establishment clause,’ which prohibits Congress from enacting any law that tends to create a state religion, as well as a ‘free exercise clause,’ which restricts Congress from interfering with the free exercise of religion. Curiously, though, he was satisfied that U.S. cases were inapplicable to Singapore because “the Singapore Constitution does not prohibit the ‘establishment’ of any religion.”¹⁵¹ However, this was beside the point because U.S. precedent interpreting the free exercise clause may have been relevant to Article 15(1), which is directed towards a similar end.¹⁵²

Chief Justice Yong also declined to refer to U.S. cases on the ground that “[t]he social conditions in Singapore are, of course, markedly different from those in the United States.”¹⁵³ He said: “On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context.”¹⁵⁴ Unfortunately, he did not articulate what these markedly different social conditions were, making it hard to assess whether U.S. cases are indeed inapplicable to Singapore.¹⁵⁵

The *Kelantan* case, which was quoted in *Chan Hiang Leng Colin*, relied on the Privy Council’s judgment in *Adegbenro v. Akintola*¹⁵⁶ to support the ‘four walls’ proposition. However, a careful reading of *Adegbenro* shows that the case merely indicates that foreign legal principles should not be applied if they cannot be accommodated by the local constitutional text.¹⁵⁷ Their Lordships pointed out that “it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved”—thus not entirely ruling out the use of foreign precedents. However, it must be borne in mind that “it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions

Engagement with International Human Rights Law, 8 SING. Y.B. INT’L L. 41, 59 (2004); Li-ann Thio, *supra* note 136, at 472-74; Lee, *supra* note 92, at 124-33.

¹⁵¹ *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 at [53].

¹⁵² See Thio Li-ann, *The Secular Trumps the Sacred*, *supra* note 150, at 66-68.

¹⁵³ *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 at [53].

¹⁵⁴ *Id.*

¹⁵⁵ Li-ann Thio, *An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H.K.L.J. 152, 176 (“This perfunctory [waving] away of foreign cases on the basis of ‘we’re different’ is undesirable. A focused elaboration of the different social conditions of these countries would aid in assessing their relevance to the matter at hand.”).

¹⁵⁶ *Adegbenro v. Akintola*, [1963] A.C. 614 (P.C.) (appeal taken from Nigeria).

¹⁵⁷ Lee, *supra* note 92, at 124-25.

which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.”¹⁵⁸

Indeed, the reluctance of the High Court in *Chan Hiang Leng Colin* to refer to certain foreign precedents did not mean that it did not cite any. For instance, in support of its view that the administrative orders did not violate the Constitution, the Court cited an Australian decision, *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*,¹⁵⁹ and an Indian one, *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*.¹⁶⁰ The Australian decision was relied upon as an example of a court upholding the lawfulness of a government declaration that a corporation of Jehovah's Witnesses was “prejudicial to the defense of the Commonwealth and the efficient prosecution of war,” and the consequential seizure of its premises. The Australian court upheld the government declaration even though section 116 of the Australian Constitution protected the members' right to free exercise of their religion from incursion by the federal government.¹⁶¹ Unfortunately, the Singapore High Court did not explain why a judgment rendered in the midst of World War II should be applicable to peacetime Singapore. The *Swamiar* decision was cited for Justice Bjan Jumar Mukherjea's point that “the right of freedom of religion must be reconciled with ‘the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.’”¹⁶² Assistant Professor Arun Thiruvengadam has noted that this statement was cited out of context because Justice Bjan Jumar Mukherjea had been paraphrasing Chief Justice John Latham in *Adelaide Company of Jehovah's Witnesses*. In that case, Chief Justice John Latham had gone on to contrast it with the more liberal approach taken by the U.S. Supreme Court in *West Virginia v. Barnette*,¹⁶³ which he ultimately preferred and adopted.¹⁶⁴ Again, it might be said that the High Court made dialogical use of these foreign precedents, but if so, it did not provide sufficient justifications.

The four walls doctrine went on to be cited in three 1998 judgments—*Taw Cheng Kong v. Public Prosecutor*,¹⁶⁵ *Peter Williams Nappalli v.*

¹⁵⁸ *Adegbenro v. Akintola*, [1963] A.C. 614 (P.C.) (appeal taken from Nigeria).

¹⁵⁹ *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 CLR 116 (Austl.).

¹⁶⁰ *Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India).

¹⁶¹ *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 at [61].

¹⁶² *Id.* at [64].

¹⁶³ *West Virginia v. Barnette*, 319 U.S. 624 (1943).

¹⁶⁴ Thiruvengadam, *supra* note 117, at 149-51.

¹⁶⁵ *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SLR(R) 78 at [78] (Sing.).

Institute of Technical Education,¹⁶⁶ and the appeal from the latter case, which was reported as *Nappalli Peter Williams v. Institute of Technical Education*.¹⁶⁷ The doctrine last appeared in *Chee Siok Chin v. Minister for Home Affairs* in December 2005.¹⁶⁸ Despite courts' reliance on the four walls doctrine, foreign precedents continued to be cited as demonstrated by the *Nappalli* cases. This suggests that the courts' choice of which precedent to apply was not driven by a desire to engage in a transjudicial dialogue, but largely by the courts' perceived need to constrain their own power in order to maintain a deferential stance towards the executive and legislature.¹⁶⁹

c. 2006–Present: Chief Justices Chan Sek Keong and Sundaresh Menon

Singapore's third Chief Justice, Chan Sek Keong ("Chan C.J."), took office in 2006. During his term and the term of his successor, Sundaresh Menon, the number of foreign precedents referred to in the cases surveyed rose. This suggests that judges' ethos towards the use of such precedents in constitutional adjudication changed. What led to this change is hard to discern. As mentioned above, from 1991 onward, the Cabinet conferred a veto power over judicial nominations to the President. However, since 1991, no President has exercised the veto. This means that the Cabinet had a free hand in nominating judicial candidates that share its mindset on governance. Accordingly, the change in attitude regarding the usage of foreign precedents may simply reflect a change in the temperaments of the individual judges.

This change is illustrated by comparing the 2006 High Court judgment in *Lee Hsien Loong v. Singapore Democratic Party*,¹⁷⁰ and the 2010 Court of Appeal judgment in *Review Publishing Co Ltd v. Lee Hsien Loong*.¹⁷¹ In both decisions, the plaintiffs were Lee Hsien Loong, the current Prime Minister of Singapore, and his father Lee Kuan Yew, the former Prime Minister of Singapore, respectively. They sued for defamation. In response, the defendants argued, among other things, that Article 14(1)(a) of the Constitution required the courts to modify the defense of qualified

¹⁶⁶ *Peter Williams Nappalli v. Institute of Technical Education* [1998] SGHC 351 at [40-41] (HC) (Sing.).

¹⁶⁷ *Nappalli Peter Williams v. Institute of Technical Education* [1998] 2 SLR(R) 529 at [19] (CA) (Sing.).

¹⁶⁸ *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 SLR(R) 582 at [132] (HC) (Sing.).

¹⁶⁹ The Singapore courts' tendency to do so has been noted by, among others, Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 825-29 (2014).

¹⁷⁰ *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 SLR 675 (HC) (Sing.).

¹⁷¹ *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 SLR 52 (CA) (Sing.).

privilege along the lines of *Reynolds v. Times Newspapers Ltd*, a United Kingdom decision.¹⁷² In that case, the House of Lords held that publishers have a good defense to libel if they have practiced “responsible journalism.”¹⁷³ In *Lee Hsien Loong*, the High Court held that the House of Lords in *Reynolds* modified the common law of defamation in light of Article 10 of the European Convention, which was to have binding effect in the United Kingdom when the Human Rights Act 1998¹⁷⁴ came into force. Thus, the Court held that since the phrasing of Article 10 of the Human Rights Act differed from that of Article 14 of Singapore’s Constitution, *Reynolds* should not be followed.¹⁷⁵ The High Court essentially adopted the approach taken in *Jeyaretnam*, which was binding on it.

The Court also considered the Australian decision *Lange v. Australian Broadcasting Corporation*,¹⁷⁶ and the New Zealand decision *Lange v. Atkinson*,¹⁷⁷ both of which held that a defense of privilege to defamation applies to statements containing information on political and government matters.¹⁷⁸ However, the Court declined to adopt this principle because both decisions were “decisions born of the constitutional, political and social contexts in Australia and New Zealand.”¹⁷⁹ Without providing details as to why these contexts were different in Singapore, the Court reiterated the stand taken in *Jeyaretnam* that the reputations of public figures should be protected to the same extent as those of ordinary people.¹⁸⁰

In *Review Publishing*, the Court of Appeal departed from cases like *Chan Hiang Leng Colin* and *Lee Hsien Loong*, where assertions that conditions in Singapore are different from those in other countries were made but not fully justified. Chan C.J., who penned the Court’s opinion, stated that the defendants were not entitled to rely on Article 14 because they were not Singaporean citizens.¹⁸¹ Nonetheless, he proceeded to discuss on an obiter basis whether citizens could rely on the *Reynolds* defense. He did not provide a definitive answer, but said that the courts would need to make

¹⁷² *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.) (U.K.).

¹⁷³ This is assessed by considering a non-exhaustive list of factors such as whether the subject matter is of public concern, whether steps have been taken to verify information, and whether it was necessary to publish the information urgently. *Id.* at 205; see also *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 SLR 52 at [192] (CA) (Sing.).

¹⁷⁴ Human Rights Act, 1998, c. 42 (Eng.).

¹⁷⁵ *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 SLR 675 at [75-76] (HC) (Sing.).

¹⁷⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Austl.).

¹⁷⁷ *Lange v Atkinson* [2000] 3 NZLR 385 (CA) (N.Z.).

¹⁷⁸ *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 SLR 675 at [77-80] (HC) (Sing.).

¹⁷⁹ *Id.* at [81].

¹⁸⁰ *Id.*

¹⁸¹ For the exact wording of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 14(1)(a), see *supra* note 127 and accompanying text.

a value judgment when striking a balance between freedom of expression and the protection of reputation, and this would depend on “local political and social conditions.”¹⁸² His Honor then examined some considerations bearing upon these local conditions, including the fact that “there is no room in our political context for the media to engage in investigative journalism which carries with it a political agenda,” and that “[o]ur local political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of this country.”¹⁸³ Chan C.J.’s discussion of these considerations may be critiqued on the ground that it relied too heavily on past court cases and statements by government ministers, and did not account for the views of civil society groups and opposition politicians. Even so, the endeavor to provide principled reasons distinguishes this case from earlier ones. Chan C.J. concluded by commenting that if the courts did find that citizens were entitled to avail themselves of the *Reynolds* defense, it would be necessary to consider how the “new balance” between free speech and protection of reputation should be struck, and, “[i]n this regard, it would . . . be helpful for our courts to bear in mind the different approaches which other common law jurisdictions have taken in order to give freedom of speech precedence over protection of reputation.”¹⁸⁴

In the 2008 judgment of *Tan Chor Jin v. Public Prosecutor*,¹⁸⁵ the Court of Appeal considered whether the appellant, who had been convicted by the High Court of shooting and killing a man, had been deprived of his right to counsel because the trial judge had denied him permission to speak with a lawyer just before closing submissions were to be made. Prior to the start of the trial, and again on the first day of the hearing, the appellant confirmed that he wished to represent himself. The Court embarked on an extensive review of cases from Canada, Malaysia, and the United States, as well as Privy Council judgments on appeal from Jamaica.¹⁸⁶ The Court eventually concluded that the common thread in these cases was the need to ensure fairness to the accused.¹⁸⁷ It declined “[f]or now” to adopt the U.S. approach of laying down a detailed test as to when someone might waive his or her right to counsel, instead holding that courts should consider whether

¹⁸² *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 SLR 52 at [271] (CA) (Sing.) (citing *Lange v. Atkinson* [2000] 1 NZLR 257, 261 (P.C.)).

¹⁸³ *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 SLR 52 at [272] (CA) (Sing.); see also *id.* at [273-85].

¹⁸⁴ *Id.* at [286].

¹⁸⁵ *Tan Chor Jin v. Public Prosecutor* [2008] 4 SLR(R) 306 (CA) (Sing.).

¹⁸⁶ *Id.* at [56-67].

¹⁸⁷ *Id.*

the lack of legal representation led to unfairness or prejudice to the accused.¹⁸⁸ It then found that, on the facts, the appellant had not been prejudiced.

References to foreign precedents also proved helpful in the Court of Appeal judgments *Yong Vui Kong v. Attorney-General*¹⁸⁹ and *Ramalingam Ravinthran v. Attorney-General*,¹⁹⁰ delivered in 2011 and 2012, respectively, by Chan C.J. and Judges of Appeal Andrew Phang and V.K. Rajah. In *Yong Vui Kong v. A.G.*, the issue was the justiciability of the power to grant clemency, which is conferred on the President by Article 22P of the Constitution and exercisable upon the Cabinet's advice. In a separate opinion, Chan C.J. examined cases from Australia, Canada, the Caribbean States, England, Hong Kong, India, Malaysia, and New Zealand. He preferred the line of authorities indicating that the clemency power is subject to judicial review if it is alleged to have been exercised in bad faith or unconstitutionally.¹⁹¹ In *Ramalingam*, Chan C.J. held that the exercise of prosecutorial discretion is judicially reviewable on the same grounds. In the course of his judgment on behalf of the Court, he referred to a Privy Council decision on appeal from Malaysia,¹⁹² as well as decisions of U.S. federal courts, to support the conclusion that a presumption of constitutionality or legality applies to the exercise of prosecutorial discretion.¹⁹³

One common feature of *Tan Chor Jin*, *Yong Vui Kong v. A.G.*, and *Ramalingam* is that the relevant provisions of the Constitution requiring interpretation were not that different from analogous provisions in foreign jurisdictions. For instance, the constitutional issue in *Tan Chor Jin* related to Article 9(3), the relevant parts of which state: "Where a person is arrested, he . . . shall be allowed to consult and be defended by a legal practitioner of his choice."¹⁹⁴ The Court of Appeal looked at cases from Malaysia, Canada, and Jamaica, among other jurisdictions. Article 5(3) of the Malaysian Constitution is identical to Singapore's Article 9(3), since the latter was imported from the former.¹⁹⁵ Section 10(b) of the Canadian Charter states: "Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right,"¹⁹⁶ while section

¹⁸⁸ *Id.* at [68].

¹⁸⁹ *Yong Vui Kong v. A.G.* [2011] 2 SLR 1189 (CA) (Sing.).

¹⁹⁰ *Ramalingam Ravinthran v. Attorney-General* [2012] 2 SLR 49 (CA) (Sing.).

¹⁹¹ *Id.* at [37-85].

¹⁹² *Id.* at [21-29].

¹⁹³ *Id.* at [49-50].

¹⁹⁴ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 9(3).

¹⁹⁵ Republic of Singapore Independence Act (Act 9 of 1965) s 6(1).

¹⁹⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 10(b) (U.K.).

20(6)(c) of the Constitution of Jamaica 1962 provides: “Every person who is charged with a criminal offence . . . shall be permitted to defend himself in person or by a legal representative of his own choice.”¹⁹⁷ Thus, similarities between constitutional provisions in Singapore and in other jurisdictions likely gave the Court of Appeal confidence to apply precedents from these jurisdictions.

On the other hand, the courts remain cautious about applying foreign precedents decided on the basis of differently worded bills of rights. In *Yong Vui Kong v. Public Prosecutor*,¹⁹⁸ a 2010 decision by Chan C.J. and Judges of Appeal Phang and Rajah, the Court of Appeal considered judgments of the Privy Council primarily from the Caribbean States, as well as judgments from India, Malawi, Uganda, and the United States.¹⁹⁹ However, it found these judgments inapplicable in determining whether Article 9(1) of the Singapore Constitution prohibits inhuman punishment, as all except the Indian judgment were based on bills of rights that contain specific prohibitions against inhuman punishment, whereas Article 9(1) does not.²⁰⁰ The Court took the view that Article 9(1) could not be read to contain such a prohibition by implication. It held this because, while a 1966 constitutional commission proposed that a specific proscription against torture and inhuman or degrading punishment or treatment be inserted into the Constitution, this suggestion, though accepted in principle by the Government, was ultimately not acted upon.²⁰¹ As for the Indian case, *Mithu v. State of Punjab*,²⁰² the Court of Appeal declined to follow it on three grounds despite the fact that the Indian Constitution, like the Singapore one, does not expressly outlaw inhuman punishment. First, the Supreme Court of India applied a test of fairness, justice, and reasonableness, which the Singapore Court found too vague, and which “requires the court to intrude into the legislative sphere of Parliament as well as engage in policy making.”²⁰³ Secondly, the decision implied that all legislatively prescribed mandatory sentences and all fixed minimum and maximum sentences are

¹⁹⁷ Jamaica (Constitution) Order in Council, 1962, § 20(6)(c) (U.K.).

¹⁹⁸ *Yong Vui Kong v. Public Prosecutor* [2010] 3 SLR 489 (CA) (Sing.) [hereinafter *Yong Vui Kong v. P.P.*].

¹⁹⁹ *Id.* at [34].

²⁰⁰ *Id.* at [50].

²⁰¹ *Id.* at [64-74]. The author has suggested that since the documentary record is equivocal as to why Parliament decided against incorporating the prohibition into the Constitution, this should not have prevented the Court of Appeal from taking a generous approach and inferring it into Article 9(1). See Jack Tsen-Ta Lee, *The Mandatory Death Penalty and a Sparsely Worded Constitution*, 127 L. Q. REV. 192, 193 (2011).

²⁰² *Mithu v. State of Punjab*, A.I.R. 1983 S.C. 473 (India).

²⁰³ *Yong Vui Kong v. P.P.* [2010] 3 SLR 489 at [79-80] (CA) (Sing.).

unconstitutional; although that “may be . . . the law in India . . . it is not the law in Singapore.”²⁰⁴ Finally, the Court held that “[t]he decision in *Mithu* is entirely understandable, having regard to the economic, social and political conditions prevailing in India and the pro-active approach of the Indian Supreme Court in matters relating to the social and economic conditions of the people of India,”²⁰⁵ thus suggesting that different conditions existed in Singapore, and that the courts should not adopt an activist stance when interpreting the Constitution.

II. ANALYSIS AND CONCLUDING THOUGHTS

The selected Supreme Court judgments above highlight the fact that Singapore courts have consistently referred to foreign precedents in constitutional adjudication over the past half-century. This was true even during the period roughly corresponding with Chief Justice Yong Pung How’s term of office (1990–2006), when the four walls doctrine held sway, although there was a fall in the number of such precedents cited. The last explicit mention of the doctrine was in 2005; since then, “it appears that the ‘four walls’ doctrine has quietly fallen out of fashion at least in practice, as courts now regularly consider foreign cases which have only persuasive, not precedential value It is fair to say that the development of Singapore public law is not accomplished in a cloister sealed off from transnational models, but through a thoughtful engagement with foreign cases.”²⁰⁶

However, the mere references to foreign precedents do not mean that the courts have consistently engaged in a transjudicial dialogue with their counterparts abroad. Rather, it appears that judges have been willing to apply foreign precedents only where the wording of the Constitution and the constitutional arrangements in Singapore are fairly analogous to the constitutional texts and arrangements upon which the precedents were decided. Judgments illustrating this include *Kok Hoong Tan Dennis*, *Sivadas*, *Chng Suan Tze*, *Tan Chor Jin*, *Yong Vui Kong v. A.G.*, and *Ramalingam*. Some cases such as *Jeyaretnam* and *Chan Hiang Leng Colin* also demonstrate the courts’ tendency to approvingly quote passages from foreign cases to support statements of law without necessarily analyzing in detail the reasoning underlying such cases. What judges have not been

²⁰⁴ *Id.* at [81-82].

²⁰⁵ *Id.* at [83].

²⁰⁶ Thio Li-ann, *The Judiciary*, in A TREATISE ON SINGAPORE CONSTITUTIONAL LAW 451, 566 (2012); see also Thio Li-ann & David Chong Gek Sian, *The Chan Court and Constitutional Adjudication—‘A Sea Change into Something Rich and Strange?’*, in THE LAW IN HIS HANDS: A TRIBUTE TO CHIEF JUSTICE CHAN SEK KEONG 87, 96-100 (Chao Hick Tin et al. eds., 2012).

willing to do, however, is to use comparative constitutional material as a springboard to develop Singapore's constitutional law in a manner incongruent with what they perceive to be the court's role in judicial review.²⁰⁷

Arun Thiruvengadam has theorized that Singaporean judges tend strongly towards the National Formalism rather than the Cosmopolitan Pragmatism model of constitutionalism.²⁰⁸ National Formalist judges are skeptical about the applicability of foreign precedents because they see the constitution as "deeply rooted in its particular history and political traditions," and are more deferential to the policy choices of the executive and legislature.²⁰⁹ In contrast, Cosmopolitan Pragmatist judges see constitutions as "normative attempts to embody notions of fundamental justice," and regard it as their responsibility to keep the constitution in line with modern societal values. They view foreign precedents favorably because they regard certain constitutional norms as transcending jurisdictional boundaries, and thus it is useful to see what solutions foreign courts have developed to deal with common problems.²¹⁰

Some of the cases examined in the previous section bear out this analysis. *Jeyaretnam*, *Lee Hsien Loong*, and *Yong Vui Kong v. P.P.* are examples of judgments in which the courts adopted quite literal readings of constitutional provisions. It will be recalled that in *Jeyaretnam*, the High Court held that since Article 14(2)(a) does not require restrictions on freedom of speech to be "necessary in a democratic society," Parliament is free to impose whatever restrictions it sees fit.²¹¹ Therefore, cases based on Article 10 of the European Convention,²¹² which does contain the phrase quoted above, are inapplicable in Singapore. Similarly, in *Yong Vui Kong v. P.P.*, the Court found foreign precedents based on bills of rights that contain

²⁰⁷ "Singapore's constitutional jurisprudence is heavily formalistic; judges are generally reluctant to recognize implied constitutional rights or constitutional evolution." Tew, *supra* note 169, at 827.

²⁰⁸ Thiruvengadam, *supra* note 117, at 133.

²⁰⁹ *Id.* at 125. See also Li-ann Thio, *Beyond the 'Four Walls'*, *supra* note 136, at 517-18 ("In Singapore, the predominant judicial strain appears to be oriented towards deferentialism to state authorities Where transnational sources are engaged with strategically, as opposed to peremptorily dismissed, these are often either used to demonstrate a lack of international consensus over the scope and content of a right or as cultural 'anti-models' in service of the articulation of a 'local conditions' jurisprudence that prioritizes statist or communal interests over individual rights.")

²¹⁰ Li-ann Thio, *Beyond the 'Four Walls'*, *supra* note 136, at 128-29; see also Lee, *supra* note 92, at 138-42.

²¹¹ See Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 14(2)(a); *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 SLR(R) 791 (CA) (Sing.).

²¹² See European Convention, *supra* note 130.

an express prohibition against inhuman punishment irrelevant when interpreting Article 9(1) of the Constitution.²¹³

The high degree of deference shown by the Singapore courts to the political branches of government is borne out by other cases indicating that legislation and executive acts must be presumed constitutional, and that the burden of establishing otherwise lies on the applicants making such claims.²¹⁴ Furthermore, the courts have demonstrated a reluctance to apply legal rules requiring them to assess the reasonableness of legislative or executive policy. We have already seen the Court of Appeal's refusal in *Yong Vui Kong v. P.P.* to adopt a test of "fairness, justice and reasonableness" to Article 9(1) of the Constitution on the ground that it is too vague and would intrude into the legislative sphere—one of the reasons why it did not apply a decision of the Indian Supreme Court.²¹⁵ Reference may also be made to the High Court's obiter opinion in *Chee Siok Chin* that a proportionality analysis should not be applied when determining if executive action had infringed the applicant's rights. The Court said this was because proportionality is a European legal concept imported into U.K. law due to the latter's treaty obligations, and because it "requires, in some cases, the court to substitute its own judgment for that of the proper authority. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law."²¹⁶

As Singaporean society matures and people become more accustomed to speaking in terms of rights and are willing to vindicate them through the courts, the number of constitutional cases heard by the courts each year is likely to increase, with a corresponding growth in the citation of foreign precedents. It is harder, though, to predict whether the scope of transjudicial dialogue will broaden, or whether the courts will continue to demonstrate

²¹³ A highly literalist approach was also taken by the High Court in *Rajeevan Edakalavan v. Public Prosecutor* [1998] 1 SLR(R) 10 at [18-19] (Sing.). See also *Thiruvengadam*, *supra* note 117, at 141-44.

²¹⁴ Regarding legislation, see for instance *Public Prosecutor v. Tan Cheng Kong* [1998] 2 SLR(R) 489 at [60] (CA) (Sing.) (applied in *Johari bin Kanadi v. Public Prosecutor* [2008] 3 SLR(R) 422 at [10] (Sing.), and *Lim Meng Suang v. Attorney-General* [2013] 3 SLR. 118 at [103] (HC) (Sing.)). Regarding executive acts, see *Ramalingam Ravinthran v. Attorney-General* [2012] 2 SLR 49 at [43-44] (CA) (Sing.).

²¹⁵ See also *Rajeevan Edakalavan v. Public Prosecutor* [1998] 1 SLR(R) 10 at [21] (Sing.) ("The Judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective. If anybody has the right to decide, it is the people of Singapore.").

²¹⁶ *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87] (HC) (Sing.); see also *Thiruvengadam*, *supra* note 117, at 136-38.

what Thio Li-ann and David Chong have called “particularism without parochialism.”²¹⁷

The signs are mixed. On the one hand, the courts have continued to adopt a deferential posture towards the executive and legislature. In a remarkably philosophical judgment rendered in 2013, entitled *Jeyaretnam Kenneth Andrew v. Attorney-General*,²¹⁸ the Court of Appeal expressed a preference for a ‘green-light’ view of public law. It said:

The recognition that members of the public do not have the right *per se* to call upon the courts to review every decision made by public bodies is not only undergirded by the obvious pragmatism of minimizing disruptiveness caused by vexatious claims to the functioning of those bodies, but also exists as a reflection of the very ethos of our adversarial system [T]he courts [are] concerned only with the individual’s rights and interests, and not matters of public policy, which rightfully remains in the remit of proper political process. In this vein, judicial review finds its place as an avenue for parties to bring claims of legality to the courts, and not for the purposes of challenging the very merits of a policy decision. Extensive judicial intervention in the administrative process is by no means the only avenue by which good governance can be ensured. Some regulatory functions can be better performed by other institutions or organs of state.²¹⁹

Accordingly, the Court held that the applicant lacked standing to bring judicial review proceedings against the Government for offering a contingent loan of US \$4 billion to the International Monetary Fund without the President’s concurrence, which the applicant alleged to be a breach of the Constitution.²²⁰ The applicant could not show that the executive act had breached any private right which he enjoyed, or breached a public right which had led to him suffering special damage.²²¹

On the other hand, the Court indicated that where “extremely exceptional instances of very grave and serious breaches of legality” appeared to have taken place, “such that it would be in the public interest for the courts to hear the case, an applicant sans rights may be accorded *locus*

²¹⁷ Thio & Chong Gek Sian, *supra* note 205, at 97.

²¹⁸ *Jeyaretnam Kenneth Andrew v. Attorney-General* [2014] 1 SLR 345 (CA) (Sing.).

²¹⁹ *Id.* at [55-56].

²²⁰ *See id.* at [4, 65].

²²¹ *Id.* at [65]. The Court also disagreed that the Government had infringed the Constitution. *Id.*

standi as well, at the discretion of the courts.”²²² Similarly, in *Yong Vui Kong v. P.P.*,²²³ the Court of Appeal shed its diffidence towards implying into the constitutional text principles that were not explicitly set out. It held on an obiter basis that legislation intended to usurp the courts’ role by securing the conviction of particular known individuals, and “legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being ‘law’ when they crafted the constitutional provisions protecting fundamental liberties,” might not qualify as ‘law’ within the meaning of Article 9(1) of the Constitution.²²⁴

Ultimately, while there is little doubt that the Singapore courts will continue to cite foreign precedents when interpreting the Constitution, the choice of which precedents to follow or reject will depend on whether they remain largely deferential to the policy choices of the political branches, or instead develop constitutional principles to subject these choices to greater scrutiny. It will be interesting to see which direction Chief Justice Sundaresh Menon, who assumed office in 2012, will steer the courts.

²²² *Id.* at [370–71].

²²³ *Yong Vui Kong v. Public Prosecutor* [2010] 3 SLR 489 (C.A.) (Sing.).

²²⁴ *Id.* at [500].