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BETWEEN APOLOGY AND APOGEE, AUTOCHTHONY: THE 'RULE OF LAW' BEYOND THE RULES OF LAW IN SINGAPORE

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I. THE 'RULE OF LAW' AS ONE OF THE PILLARS OF CONSTITUTIONAL ARCHITECTURE

Against the triumvirate of evaluative factors (*viz*. the 'rule of law', human rights and democracy) assessing good government, domestic and foreign sources[1] have given Singapore both good and bad reports.

The litany of criticisms has been rehearsed elsewhere,[2] but essentially charge that the Singapore legal system is one of 'rule by law', not 'rule of law', where law is apprehended in formalist terms as '*lex*', rather than the more majestic justice-oriented '*ius*'.[3] That is, Singapore's formal or statist 'rule of law' promotes rule-following, rather than applying public power-constraining principles to control arbitrariness.

While the 'rule of law' in protecting property rights and commercial transactions is broadly praised, its application in public law cases has attracted the greatest criticisms, some bearing weight.[4] These criticisms relate to preventive detention, ouster

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1 See *e.g.*, Li-ann Thio, "*Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore" (2002) 20 UCLA Pac. Basin L. J. 1; Gordon Silverstein, "Singapore: The Exception that Proves Rules Matter" in Tom Ginsburg & Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) 73; Ministry of Law, Media Release, LAW 06/021/026, "Singapore's Response to the Draft Report 'Singapore: Rule of Law Issues of Concern"' (9 April 2008) (on file with author).

2 Jack Lee & Eugene K.B. Tan's contribution to the Rule of Law Symposium (14-15 February 2012) where this paper was first presented.

3 George P. Fletcher, "In Honour of Ius et Lex: Some Thoughts on Speaking About Law" (Lecture in honour of Leon Petrazycki delivered at the Inauguration of "Ius et Lex" Legal Magazine, 1 June 2001), (Warsaw: "Ius et Lex" Foundation, 2001), online: "Ius et Lex" Foundation <http://www.iusetlex.pl/zalaczniki/wyklad_fletcher.pdf>.

4 See *e.g.*, International Bar Association Human Rights Institute, "Prosperity versus Individual Rights? Human Rights, Democracy and the Rule of Law in Singapore" (London: International Bar Association, 2008), online: International Bar Association <http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-C4DA-473B-943A-DD0FC76325E8> ["Prosperity versus Individual Rights?"], for the 18 recommendations at 71, 72; Eugene K.B. Tan, "Law and Values in Governance: The Singapore Way" (2000) 30 Hong Kong L.J. 91; Jothie Rajah, *Authoritarian*

clauses elevating the state above the 'rule of law' because of "necessity", alleged discriminatory application of licensing laws for public assemblies to the disadvantage of the political opposition, and allegations of a compliant judiciary which facilitates the suppression of political dissent through speech-restrictive defamation and contempt of court laws.[5]

Critics are unimpressed where the government trots out statistics indicating Singapore's high rankings in terms of 'rule of law' performances using various indicators.[6] This manoeuvre is seen as an *apology* for power. However, to invoke the 'rule of law' as a self-evident utopian vision of the good state, where a civilised constitutional order reaches its *apogee*, to critique polities not meeting declared criteria, may entail its deployment as a rhetorical tool to advance a particularist vision of good government in the name of a universal "standard of civilisation".[7] This is not to discount the concept of universal justice, but to examine the universality of such normative claims, to avoid a myopic parochialism in a complex plural, postmodern world.[8] It also opens up the possibilities of *autochthony,* of developing an indigenised variant of the 'rule of law' in Singapore which is no mere handmaiden to an authoritarian state.

Two preliminary observations are necessary to undergird the normative and empirical interrogation of the 'rule of law'. First, the 'rule of law' is *not an absolute value.* There may be good reasons for derogating from it, based on social values such as democracy, equity, higher moral principles, *etc*. If the application of general laws is an uncontroversial 'rule of law' value, this may be departed from in the interests of legal pluralism, as embodied in the *Administration of Muslim Law Act*.[9] An economic system predicated on distributive justice may contravene the 'rule of law'

Rule of Law: Legislation, Discourse and Legitimacy in Singapore (New York: Cambridge University Press, 2012).

5 See *e.g.*, Open Letter from Chee Soon Juan to Chief Justice, Attorney-General and Law Minister of Singapore (6 January 2009), online: Singapore Democratic Party <http://www.http://yoursdp.org/publ/special_feature/chee_responds_to_cj_ag_and_law_minister/2-1-0-112>; Beatrice S. Frank *et al*., *The Decline of the Rule of Law in Singapore and Malaysia: A Report of the Committee on International Human Rights of the Association of the Bar of the City of New York* (New York: The Association, 1990).

6 See *e.g.*, Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2010* (Washington D.C.: The World Justice Project, 2010) at 19, which (adopting a thick conception of the 'rule of law') in relation to East Asia and the Pacific stated, "Singapore is the top-ranked country amongst the indexed countries in providing security and access to civil justice to its citizens. Yet it ranks very low in terms of open government, limited government powers, and fundamental rights." See also the Political and Economic Risk Consultancy (P.E.R.C.) Asian Intelligence Reports (2006-2007) ranking Singapore second in Asia for the level of confidence in Asian judicial systems: cited in Prime Minister's Office, Media Release, "Singapore Government's Response to the White Paper by Amsterdam & Peroff" (11 November 2009), online: SG Press Centre <http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/pmo/press_release/P-20091111-1> at para. 71.

7 See Gerrit W. Gong, *The Standard of Civilisation in International Society* (Oxford: Clarendon Press, 1984) at 6, 7, observing that from the 19th century, European expansion into the non-European world resulted fundamentally "in a confrontation of civilizations and their respective cultural systems". Non-European countries were measured against the supposedly superior European standard of civilisation. This set the stage for conflict as Europeans were deemed barbarians or infidels by East Asian or Islamic standards of civilisation. See also David Fidler, "The Return of the Standard of Civilisation" (2001) 2 Chicago J. Int'l L. 137.

8 See *e.g.*, Francis J. Mootz III, "Is the Rule of Law Possible in a Postmodern World?" (1993) 68 Wash. L. Rev. 249; but see Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law" (2004) 4 Macq. L.J. 135.

9 Cap. 3, 2009 Rev. Ed. Sing.

in drawing need-based differentiation between persons. A separate politico-legal theory is needed to prioritise between competing values; rhetorical assertions of the 'rule of law' will not suffice. Sir Ivor Jennings considered the 'rule of law' an "unruly horse", both hard to express and "essentially imprecise".[10]

Second, there are *competing 'rule of law' conceptions* even if the dominant conception within scholarly and policy-making arenas is that associated with Western liberal democracy.[11] Lauded as an "unqualified human good"[12] and the "jurisprudential equivalent of motherhood and apple pie"[13], the contents of the 'rule of law' remain contested, yielding many conceptions.[14] These draw form from a polity's underlying political, economic, social and religious philosophy. The 'rule of law' has been described variously as thick or thin, formal or substantive[15], statist, socialist, liberal, communitarian, *etc*.[16]

The popularisation of the 'rule of law' as a legitimating slogan of choice has brought confusion as the various associated ideas under its umbrella may conflict. In meaning everything, it cannot mean anything.[17] It is prudent to avoid over-simplistic binary dichotomies (*e.g.*, liberal or illiberal), in favour of more nuanced analysis apprehending the "degrees" of liberality along a spectrum, bookended by a liberal and an illiberal political organisation model, summarised thus:[18]

Lawlessness	Arbitrary Rule	Rule by Law	Rule of Law	Rule of Good Law
Anarchy and chaos	Capricious use of power	Law as tool of government, may be deployed for repressive ends	Law is pre-eminent; checks abuses of power	Comprehensive social philosophy, drawn from conceptions of human rights, democracy, economic justice, *etc*.

[10] Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 60.

[11] Brian Z. Tamanaha, "The Rule of Law for Everyone?" (St. John's Legal Studies Research Paper) (S.S.R.N.), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312622> ["Rule of Law for Everyone?"]; Mortimer Sellers & Tadeusz Tomaszewski, eds., *The Rule of Law in Comparative Perspective* (Dordrecht: Springer, 2010).

[12] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (United Kingdom: Penguin Books, 1990), c. Afterword. See also Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale L.J. 561 which is a book review of *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* by Douglas Hay *et al.* and *Whigs and Hunters: The Origin of the Black Act* by E.P. Thompson.

[13] Lord Bingham, "Rule of Law" (The Sixth Sir David Williams Lecture delivered at Cambridge University, 16 November 2006), (2007) 66 Cambridge L.J. 67 at 69.

[14] Brian Tamanaha has identified at least six 'rule of law' formulations, three formal versions (*viz*. Rule-by-law, Formal Legality, Democracy + Legality) and three substantive versions (*viz*. Individual Rights, Right of Dignity and/or Justice and Social Welfare): Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 91 [*On the Rule of Law*].

[15] Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) P.L. 467; Ian Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994).

[16] See Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (London & New York: Routledge, 2004).

[17] Andrei Marmor, "The Rule of law and its Limits" (2004) 23 Law & Phil. 1.

[18] Li-ann Thio, "Constitutionalism in Illiberal Polities" in Andras Sajo & Michel Rosenfeld, eds., *The Oxford Handbook on Comparative Constitutionalism* (Oxford: Oxford University Press, 2012) 133.

What is clear too, is that debates over the 'rule of law' implicate debates over liberalism/communitarianism, capitalism/communism, the secular/sacred, public/private, laissez-faire/social welfare economics and natural law theory/legal positivism. For these debates, easy answers do not exist if one is given to reasoned deliberation over emotive sloganeering,[19] prey to political capture.

Clearly, the architects of the Singapore constitutional order, while not discounting the relevance of "values from European and American civilizations" such as "parliamentary democracy and the rule of law"[20] which have been adopted and adapted, do not associate Singapore with the model of Western liberal democracy.[21] In a nutshell, key features of a liberal state are its emphasis on individual liberty and requirement that states be 'neutral' (insofar as is possible, which is questionable) towards conceptions of the good life. Indeed it was during the triumphant mood of the post-Cold War era in the early 1990s[22] that the 'Asian values' school with which Singapore is closely associated, flourished as a key strain of dialogue in international relations and discussions of 'good governance'. This reflected the developmentalist state's priorities in efficient and effective government, sometimes anchored by assertions of cultural particularities, and the need to secure political stability by curtailing civil and political rights, to facilitate economic growth.

Thus, Singapore as a case study demonstrates how economic development and liberalisation can take place apart from political liberalisation. This distinctive route has secured it various epithets: 'soft authoritarian' state, semi-authoritarian, illiberal, non-liberal and communitarian democracy.[23] The issue arising is this: when the Singapore constitutional order is criticised for falling short of Western liberal conceptions of "human rights, democracy and the rule of law", how legitimate is this? Is such a western liberal model(s) the "end of history",[24] and is it normatively compelling, or simply an arrogant particularistic imposition and form of latter day cultural hegemony? If the conception of the 'rule of law' draws from the political and economic philosophy practised in a certain context, by what and by whose values do we judge the superiority or deficiency of various models?

The more substantive a conception of the 'rule of law', the more open it is to controversy. All substantive conceptions encompass formal conceptions of the 'rule of law' and "go further, adding on various content specifications".[25] For example, Ronald Dworkin's 'rights-based' conception of the 'rule of law', designed to "capture

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19 Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology" [2007] University of New South Wales Faculty of Law Research Series 65.

20 Sing., "White Paper on Shared Values", Cmd 1 of 1991 at para. 29 ["Shared Values White Paper"].

21 Peh Shing Huei, "Asian nations must find own political, media models: PM" *The Straits Times* (7 October 2006) 3.

22 See *e.g.*, *Charter of Paris for a New Europe*, 21 November 1990, (1991) 30 I.L.M. 193, which preamble states: "Ours is a time for fulfilling the hopes and expectations our peoples have cherished for decades: steadfast commitment to democracy based on human rights and fundamental freedoms; prosperity through economic liberty and social justice; and equal security for all our countries."

23 See *e.g.*, Gordon P. Means, "Soft Authoritarianism in Malaysia and Singapore" (1996) 7:4 Journal of Democracy 103; Francis Fukuyama, "Asia's Soft Authoritarian Alternative" (1992) 9:2 New Perspectives Quarterly 60; Steven J. Hood, "The Myth of Asian-Style Democracy" (1998) 38 Asian Survey 853.

24 *Pace*, Francis Fukuyama. (See his thesis in Francis Fukuyama, *The End of History and the Last Man*, (New York: The Free Press, 1992); Francis Fukuyama, "Asian Values and the Asian Crisis" (February 1998) Commentary Magazine 23-27.

25 Tamanaha, *On the Rule of Law*, *supra* note 14 at 102.

and enforce moral rights",[26] as distinct from the 'rule book' conception. Dworkin anchors his theory by avoiding metaphysics and identifies the source of these rights as the community's understanding of moral rights, imperative to ensuring individuals of what he terms as "equal respect and concern".[27] This is a substantive theory, and there are no uncontroversial substantive theories. Dworkin places his faith in judges ascertaining what community understandings are; however, it is not clear why a judge, as opposed to a legislator, should make determinations over morally controversial disputes. This is a misplaced faith that fails to take seriously the depth of division of moral viewpoints over polarising, intractable issues.[28]

In order to get a clearer picture of what the 'rule of law' uncontroversially insists upon, it is useful to identify its minimum core to better ascertain when a supersized version incorporating a substantive ideology is being advanced as an authoritative norm, to subject its merits to scrutiny. This requires a decoupling of *liberalism*, with its valorisation of individual autonomy, from the '*rule of law*', so as to free up imaginative space to apprehend what Tamanaha describes as the "pre-liberal version" and the "liberal version"[29] of the 'rule of law'; this will pave the way for charting the course for a post-liberal version of the 'rule of law' as an alternative to ordering good government, not a negation of it. This may be attractive to non-liberal societies which "accord primacy to the community and share a community generated vision of the good"[30].

Shorn of adornment, the minimum core of the 'rule of law' would include the principles of generality of laws and their equal application such that no one is above the law. The chief goal of the 'rule of law', which may be appreciated as "a couple of fundamental ideas", is to ensure protection against government tyranny through the articulation of a higher law, an ancient common law idea that founds its expression in the Latin maxim "*quod Rex non debet esse sub homine, sed sub Deo et lege*" (*i.e.* the King himself ought not be subject to Man, but *subject to God and the law*, for the law makes the King).[31] In modern parlance, this speaks of a supreme law which governs the governors, whether as part of a supreme constitution or fundamental common law norm. It importantly relates to "qualities of legality"[32],[33]

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to

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26 Ronald Dworkin, *A Matter of Principle* (Massachusetts: Harvard University Press, 1985) at 11. This turns on Dworkin's own vision of what an accurate conception of rights entails, which has its detractors.

27 Ronald Dworkin, *Taking Rights Seriously* (Massachusetts: Harvard University Press, 1977) at 272, 273.

28 *E.g.*, Tamanaha, *On the Rule of Law*, *supra* note 14 at 103, 104, writes that contemporary U.S. society "is deeply divided over abortion, affirmative action in employment and education, rights of homosexuals, the death penalty, hate speech, access to pornography, public funding for religious schools". He concludes, rightly, that "there is no uncontroversial way to determine what these rights entail", which is a problem attending all substantive theories of the rule of law incorporating their favoured conception of rights.

29 "Rule of Law for Everyone?", *supra* note 11; Graham Walker, "The Idea of Nonliberal Constitutionalism" in Ian Shapiro & Will Kymlicka, eds., *Ethnicity and Group Rights*, 1st ed. (New York: New York University Press, 1997) 154.

30 "Rule of Law for Everyone?", *ibid.*

31 *Prohibitions del Roy* (1658), Mich. 5 Jacobi 1, 77 E.R. 1342 at 1343 (Com. Dig. Courts), Sir Edward Coke (quoting Henri le Bracton, *De Legibus et Consuetudinibus Angliae* [On the Laws and Customs of England], vol. 2 (1256) at 33).

32 Tamanaha, "Rule of Law for Everyone?", *supra* note 11.

33 F.A. Hayek, *The Road to Serfdom*, 1st ed. (Chicago: University of Chicago Press, 1944) at 72.

> foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

Other sub-rules of the 'rule of law', which seek to limit arbitrariness through a rules-based regime, would include "the notions of the transparency, openness and prospective application of our laws, observations of the principles of natural justice, independence of the Judiciary and judicial review of administrative action"[34]. This minimalist elements approach towards the 'rule of law', will mean that such a conception will be "compatible with gross violations of human rights", as the human dignity it protects extends only to enabling a person to make plans about his future, a form of personal rather than political freedom.[35] This does not discount the importance of norms like human rights and democracy, but rather requires these to be debated separately as these also have competing conceptions and are subject to controversies where political claims are conflated with legal entitlements as a matter of strategy. While there are core human rights, there are also contested claims which activists label as human rights; added to this is the complexity in negotiating universal standards in terms of substantive content and scope of rights which may vary according to local particularities. Cumulatively, human rights, democratic practices and the 'rule of law' contribute towards good government, frequently in a complementary or mutually reinforcing manner.[36]

The remainder of this article is structured thus: Part II examines the conception of the 'rule of law' within the Singapore context in general, against the matrix of other constitutional principles and aspects of political culture that shape its contours. Part III specifically examines the role of the judiciary and of judicial independence in relation to the constitutional right of free speech and the recognised grounds of derogation, specifically relating to political libel. Part IV offers concluding observations on the role of the 'rule of law' in the post-deferential, re-politicised Singapore emerging after the 2011 General Elections. It considers whether the criticism that the 'rule of law' in Singapore is unduly thin and formalistic, which may have had its merits in the 20th century, is still relevant in the 21st.

II. Contextualising Singapore: 'Rule of Law' with Singapore Characteristics

The role of the 'rule of law' within a constitutional order is shaped by its interaction with other constitutional principles as well as the politico-legal culture, key features of which are identified below. The 'rule of law' in Singapore, where it is accepted as a "universal value"[37], operates against two key features of a "modern

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[34] Sing., *Parliamentary Debates*, vol. 71, col. 569 at 592 (24 Nov 1999) (Associate Professor Ho Peng Kee).

[35] Joseph Raz**,** "The Rule of Law and Its Virtue" (1977) 93 L.Q.R. 195 at 196; see also Lon Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969) at 33-91.

[36] Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship?" (2004-2005) 36 Geo. J. Int'l L. 809.

[37] K. Shanmugam, (Keynote address delivered at the Rule of Law Symposium 2012, 14 February 2012), online: Ministry of Law, Singapore <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/6/Default.aspx?ItemId=618> at para. 3.

civilised society"[38], which are the sovereign right of the people to elect their government and the requirement that laws not offend a society's "norms of fairness and justice"[39].

The 'rule of law' in serving good governance is viewed as a cardinal requirement of economic development and is apprehended as part of a strategy to manage the multi-ethnic and multi-religious composition of the population and the potentially harmful "power of chauvinism".[40] Social stability is promoted through providing a general secular law able to treat all citizens equally, regardless of race, language or religion and promoting interaction by "making expectations transparent"[41] in non-homogenous societies. Thus, "maintaining racial and religious harmony has become an important tenet for [Singapore] when approaching the rule of law".[42] Furthermore, a "strong stand" is taken on maintaining law and order to ensure "a low crime rate".[43]

A. *Trust Issues, Political and Legal Constitutionalism*

A cardinal function of a constitution is to channel and constrain power and to help realise the fundamental values of a polity: "[Y]ou must first enable the government to control the governed, and in the next place oblige it to control itself."[44]

This is accomplished through establishing normative principles designed to regulate public power, establishing institutions, listing individual and group rights and providing machinery for their redress. Underlying this is the need to find equilibrium between securing institutional accountability and autonomy in the exercise of public powers by government agencies. If a government is perceived as being composed presumptively of knaves (after David Hume[45]), distrust and fear of abuse is the operating assumption influencing constitutional design.[46] However, in Singapore, the "politics of virtue" is a dominant *leitmotif*, this being "an approach to statecraft that

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38 K. Shanmugam, (Speech delivered at the New York State Bar Association Rule of Law Plenary Session, 28 October 2009), online: SG Press Centre <http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/speech/S-20091028-1> at para. 7 ["New York Bar Association Speech"].

39 *Ibid*.

40 *Ibid*. at para. 21.

41 S. Jayakumar, "The Meaning and Importance of the Rule of Law" (Keynote address delivered at the International Bar Association Conference 2007 Rule of Law Symposium, 19 October 2007), online: Subordinate Courts of Singapore <http://app.subcourts.gov.sg/Data/Files/File/Speeches/2007Oct19_IBA_%20MinisterOfLaw.pdf> at para. 17.

42 *Ibid*. at para. 19.

43 *Ibid*. at para. 25.

44 James Madison, "The Federalist No 51" in Jacob E. Cooke, ed., *The Federalist*, 1st ed. (Middletown: Wesleyan University Press, 1961) 347.

45 "It is, therefore, a just political maxim that every man must be supposed a knave, though at the same time it appears somewhat strange that a maxim should be true in politics which is false in fact.": David Hume, *Essays, Moral, Political and Literary*, ed. by Eugene F. Miller (Indianapolis: Liberty Fund, 1987).

46 "[T]he ostensible rationale for a constitutional amendment creating the office of the elected presidency in 1991 was to address the untrammelled power enjoyed by the parliamentary executive, and the fear that this would lead to financially imprudent policies which would bankrupt the national coffers.": Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at 161 [*Treatise on Singapore Constitutional Law*].

gives first place to considerations of excellence of character".[47] This is reflected in the official national ideology:[48]

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

The importance attributed to the reputation of public men has been a consistent reason why members of the People's Action Party ("PAP") government bring defamation suits to defend their integrity, lest they lose their moral authority.[49] This appears to be reflected in judicial theorising about the importance of reputation, which is explored further below. The presumption of trust is further reflected in the presumption of legality (*viz*. *omnia praesumuntur rite esse acta*[50]) as it applies particularly to the actions of holders of high constitutional office. This filters out "fanciful hypotheses" that a constitutional officer, such as the Attorney-General would act spitefully in discharging his duties, as "all things are presumed to have been done rightly and regularly, *ie*, in conformity with the law."[51] Presumptions may be rebutted, as it would be intolerable if a constitutional officer was treated as trustworthy by dint of mere assertion, without redress for misfeasance.

Of the British context, where political constitutionalism (*viz*. holding public power to account by political methods of accountability) is a key feature, it has been observed that unlike the deep distrust Americans harbour towards public authority, the British do not "possess an inherent suspicion of the political authorities"[52] such that Parliament may be trusted to act reasonably and with self-restraint, in relation to individual rights, to safeguard common morality and to play fairly by the rules of the game.[53] Thus, Parliament plays an important role in protecting rights; this is distinct from the heightened judicialisation associated with American-style judicially enforceable rights-based constitutionalism, which raises questions of "juristocracy" or illegitimate judicial legislation driven from the subjective political agendas of judges, which exacerbates legal indeterminacy and where 'rule by judges' supplants the 'rule of law'.

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47 J. Budziszewski, "Politics of Virtues, Government of Knaves" (June/July 1994) First Things, online: First Things <http://www.firstthings.com/article/2007/01/politics-of-virtuesgovernment-of-knaves-45>.

48 "Shared Values White Paper", *supra* note 20 at para. 41.

49 See *e.g.* Chua Lee Hong *et al*., "Many People Around the World 'Embrace Junzi Principle'" *The Straits Times* (22 August 1997) 36 (Prime Minister Goh observing that government leaders had to be *junzi* such that "if our integrity is attacked, we defend it.").

50 All things are presumed to have been done rightly and regularly.

51 *Yong Vui Kong v. Attorney-General* [2011] 2 S.L.R. 1189 at para. 139 (C.A.) [*Yong Vui Kong*].

52 Ariel L. Bendor & Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model" (2002) 17 Am. U. Int'l Rev. 683 at 686.

53 *Ibid.* at 700-702. With the advent of the *Human Rights Act 1998* (U.K.), 1998, c. 42 [*HRA*], which came into force in 2000, the courts have an enlarged role in protecting rights as they may issue declarations of incompatibility where government action which restrains a recognised right is seen to be incompatible with the standards of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, 213 U.N.T.S.221, Eur. T.S. 5 [*ECHR*], consonant with the doctrine of parliamentary sovereignty.

The trust the British may have for their governors is not a blind one, but the working assumption seems to be that parliamentarians will be guided by common sense and an awareness that they are responsible to the electorate. Senior Minister ("SM") Goh Chok Tong in expounding on the topic of "Increasing Public Trust in Leaders of a Harmonious Society"[54] noted that in the absence of trust in public institutions, "it is difficult, if not impossible, for the government to persuade the people to accept tough and painful solutions to overcome the challenges and difficulties faced by the entire nation. In [his] mind, this trust lends more legitimacy to a government than its legal authority." In his opinion, given Singapore's vulnerabilities, "a strong, competent and morally upright government is essential to Singapore's survival", which translates into a "critical and leading role to play in nation-building".[55] This was contrasted with the "adversarial approach" motivated by a "trust deficit" towards the government, reflected in the development of "institutional checks on government".[56] However, SM Goh did not assume that trusting governors was something to be assumed or asserted, nor could it be "compelled" or "based on fear", as it "has first to be earned and then nurtured based on integrity, dedication, fairness and the ability to produce results for the people".[57] That is, trust is contingent on a successful track record or what has been described as 'performance legitimacy'[58], as opposed to the legitimacy that comes from democratic elections which is also a facet of Singapore political discourse. When corrupt or incompetent governors break trust,[59] "the remedy must be sought through checks and balances in the political system, for example by public meetings, publicity in the media, debates and motions of no confidence in Parliament, actions in the Courts and finally by campaigning to oust such a government in a general election".[60]

Presumptions of trust can shape judicial attitudes towards the role of judicial review in maintaining a constitutional government. It may facilitate or reflect a "green light" approach to judicial review and the administrative state, where courts are not envisaged as "the first line of defence" against abuses of public power as "control can and should come internally from Parliament and the Executive itself in

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54 Goh Chok Tong, "Increasing Public Trust in Leaders of a Harmonious Society" (Speech delivered at the Singapore-China Forum on Leadership, 16 April 2010), online: SG Press Centre <http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/micacsd/speech/S-20100416-1>.

55 *Ibid.* at para. 2.

56 *Ibid*. at para. 26.

57 *Ibid*. at para. 25.

58 Law Minister K. Shanmugam, for instance, has made the point that "[the success of the Singapore model of governance can be] captured in one statistic. [Singapore's] per capita GDP has grown from US$500 in 1965 to US$51,500 [in 2009]. And no disappearances, shootings on the roads, coups, juntas, muggings and so on.": Shanmugam, "New York Bar Association Speech", *supra* note 38 at para. 101.

59 Robert Sidelsky argues that a "low-trust society is an enemy of freedom [in producing] a juggernaut of escalating regulation and surveillance which will reduce trust further. [As such,] a free society requires a high degree of trust to reduce the burden of monitoring and control, and trust requires internalized standards of honor, truthfulness, and fairness." He prescribes the protection of social institutions like the family which foster "trust-based ways of life" by incubating commitment, as well as viewing religious belief "as a powerful social resource for good behaviour.": Robert Sidelsky, "In Regulation We Trust?" (18 December 2009), online: Project Syndicate <http://www.project-syndicate.org/commentary/in-regulation-we-trust->.

60 Sing., "Maintenance of Religious Harmony White Paper", Cmd 21 of 1989 at para. 21.

upholding high standards of public administration and policy".[61] In this conception, the courts play "a supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law", while the prescription is to "seek good government through the political process and public avenues", rather than judicial review.[62]

Arguably, when it comes to fundamental liberties, the courts should play a more pro-active guardianship role as a counter-majoritarian check against the government, as a corrective or buffer to the asymmetrical relations between the all-powerful state and the vulnerable individual, consonant with the rights-based model of legal constitutionalism.[63] Indeed, there is a stream of judicial reasoning that advocates the adoption of a "generous" interpretation in construing the *Constitution*'s Part IV liberties,[64] such that an individual will enjoy the full measure of his rights.[65] There is another, more dominant stream where public order values apparently enjoy the status of a "trump"[66], which reflects a statist bent, as well as emerging jurisprudence which may be characterised as "communitarian", which seeks to ensure that in balancing a right and recognised exceptions to that right, "neither can be defined in such a way that renders the other otiose."[67] For example, the Court of Appeal in *Public Prosecutor v. Kwong Kok Hing*[68] expressly identified the "communitarian values" underlying a core component of public law, that is, criminal law, which included the "preservation of morality, the protection of the person, public peace and order, respect for institutions and the preservation of the state's wider interests".[69] This is also reflected in official government ideology.[70]

While a statist model of interpretation blunts the muscularity of legal constitutionalism in controlling government, a communitarian approach does not necessarily do so; however, in adopting a structured conception of rights[71] or one which takes

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61 Chan Sek Keong C.J., "Judicial Review—From Angst to Empathy" (2010) 22 Sing. Ac. L.J. 469 at para. 29.

62 *Ibid*.

63 On the core tenets of legal constitutionalism, see Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 43.

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

65 *Ong Ah Chuan v. Public Prosecutor* [1979-1980] S.L.R.(R.) 710 at para. 23 (P.C.).

66 In *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 S.L.R.(R.) 209 at para. 64 (H.C.) [*Colin Chan*], the High Court declared the "sovereignty, integrity and unity of Singapore [was the] paramount mandate [of the Constitution such that] anything [including fundamental liberties] which tend to run counter to these objectives must be restrained". Such a statement bears little nuance or attempt at balancing competing values.

67 *Attorney-General v. Shadrake Alan* [2011] 2 S.L.R. 445 at para. 57 (H.C.) [*Shadrake (No. 2)*], Loh J. noting that the offence of contempt must be defined consistently with "the words, structure and spirit" of the free speech guarantee under art. 14 of the *Constitution*, *supra* note 64.

68 [2008] 2 S.L.R.(R.) 684 (C.A.).

69 *Ibid*. at para. 17.

70 See "Shared Values White Paper", *supra* note 20 at para. 30: "While stressing communitarianism, we must remember that in Singapore society the individual also has rights which should be respected, and not lightly encroached upon. The Shared Values should make it clear that we are seeking a balance between the community and the individual, not promoting one to the exclusion of the other."

71 See *e.g.*, Richard Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms and Constitutionalism" (1998) 27 J. Legal Stud. 725 (arguing that rights are a means of realising or protecting the integrity of common goods). See also the holistic identification of four distinct interests (*viz*. the right of free speech, the right to freedom from offence, the concerns of one ethnic group and of the community at large) in *Public Prosecutor v. Koh Song Huat Benjamin* [2005] SGDC 272, which involved a prosecution

the law seriously in balancing rights against the social value of the law[72] as a normative prescription, a communitarian approach will produce different results from one where a certain right is valourised or prioritised, by seeking an optimising equilibrium between rights, competing rights/interests, responsibilities and goods. In this conception, rights are not considered antithetical to the common good, which the development of the common law is to serve,[73] but integral to it.[74] The Court of Appeal, in *obiter* in *Review Publishing v. Lee Hsien Loong*[75] offered a fourfold typology of rights with different weights, which would affect the balancing process.[76]

Former Law Minister S. Jayakumar in endorsing a formal conception of the 'rule of law' observed that in balancing individual and social rights, there was "no universal agreement", nor did the 'rule of law' specify where this should be struck, which would be a function of a society's "social, cultural and economic construct", and that Asian societies like Singapore gave "greater importance to the larger interests of the community in arriving at this balance".[77] There is also expressed judicial wariness about the anti-social aspect of rights hyper-individualism where, as Professor J.H.H. Weiler expressed it, "if you put self at the centre of society, you have a self-centred society".[78] Social trust, civic trust and solidarity cannot be fashioned out of the parlous store of narcissism. Rajah J. (as he was then) observed in *Chee Siok Chin v. Ministry of Home Affairs*:[79]

> The tension between the individual's right to speak and/or to assemble freely and the competing interests of security and/or public order calls into play a delicate balancing exercise involving several imponderables and factors such as societal values, pluralism, prevailing social and economic considerations as well as the common good of the community. Consideration of such public policy is exceedingly complex and multifaceted. While the clarion call for unfettered individual rights is almost irresistibly seductive, it cannot, however, be gainsaid that individual rights do not exist in a vacuum. Permitting unfettered individual rights in a process that is value-neutral is not the rule of law. Indeed, that form of governance could be described as the antithesis of the rule of law—a society premised on individualism and self-interest.

In developing an autochthonous rights jurisprudence, both the Scylla of hyper-individualism and the Charybdis of collectivism must be avoided, to eschew the

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under the *Sedition Act* (Cap. 290, 1985 Rev. Ed. Sing.) for speech inciting ill-will or hostility between races or classes. See also Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 612-614.

72 Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate" (2006) 10 The Journal of Ethics 21. In *Mohamed Emran bin Mohamed Ali v. Public Prosecutor* [2008] 4 S.L.R.(R.) 411 (H.C.), the social value of anti-drug trafficking legislation was given great weight in the determination of the 'reasonable classification' test. See Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 111, 112.

73 See *Nguyen Tuong Van v. Public Prosecutor* [2005] 1 S.L.R.(R.) 103 at 126, 127 (C.A.) ("The common law of Singapore has to be developed by our Judiciary for the common good…").

74 See *Rajeevan Edakalavan v. Public Prosecutor* [1988] 1 S.L.R.(R.) 10 at para. 21 (C.A.) ("[M]atters which concern our well-being in society, of which fundamental liberties are a part…").

75 [2010] 1 S.L.R. 52 (C.A.) [*Review Publishing (2010)*].

76 *Ibid.* at paras. 286-297 (*viz.* fundamental, preferential, co-equal and subsidiary rights).

77 Jayakumar, *supra* note 41 at paras. 12, 14.

78 See Tamanaha, "The Rule of Law for Everyone?", *supra* note 11; Thio, *Treatise on Singapore Constitutional Law, supra* note 46 at 754.

79 [2006] 1 S.L.R.(R.) 582 at para. 52 (H.C.) [*Chee Siok Chin*].

corruptive force of unchecked power and unbridled liberty, given the "egoistic, licentious and antagonistic"[80] aspects of modern "rights-talk"[81].

B. *'Rule of Law' and Judicial Review*

Interpretation aside, there are clear issues over which the intent of the architects of the constitutional order or of Parliament was to deliberately exclude or severely limit judicial review, even where fundamental liberties are implicated. These relate to national security considerations and public order concerns relating to maintaining religious harmony.

This is evident in both constitutionally-authorised limitation clauses, as embodied in s. 8B(2) of the *Internal Security Act*,[82] and statutory ouster clauses as in s. 18 of the *Maintenance of Religious Harmony Act*.[83] In these regimes of exception, one recalls the observation of anti-liberal Carl Schmitt that "the sovereign defines the exception", indicating the triumph of politics over law insofar as the judicial control of government is muted or removed. This stands as an exception to the 'rule of law', which the Court of Appeal has defined as "the principle [that] "all *legal* powers… have legal limits[; t]he notion of a subjective or unfettered discretion is contrary to the rule of law".[84]

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[80] Julian Rivers, "Beyond rights: the morality of rights-language" (September 1997), online: Cambridge Papers, Jubilee Centre <http://www.jubilee-centre.org/document.php?id=18>.

[81] See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) at 14 where she states that:

> The most distinctive features of our American rights dialect are the very ones that are most conspicuously in tension with what we require in order to give a reasonably full and coherent account of what kind of society we are and what kind of polity we are trying to create: its penchant for absolute, extravagant formulations, its near—aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity. Not only does each of these traits make it difficult to give voice to common sense or moral intuitions, they also impede development of the sort of rational political discourse that is appropriate to the needs of a mature, complex, liberal, pluralistic republic. Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead towards consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state without accepting the corresponding personal and civil obligations.

[82] Cap. 143, 1985 Rev. Ed. Sing., s. 8B(2) [*ISA*], which states that "[t]here shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision." This derogation from the *Constitution*, art. 9 (dealing with personal liberty), is constitutionally authorised under the *Constitution*, arts. 149(1), (3).

[83] Cap. 167A, 2001 Rev. Ed. Sing., s. 18 [*MRHA*], which states that "[a]ll orders and decisions of the President and the Minister and recommendations of the Council made under this Act shall be final and shall not be called in question in any court."

[84] *Yong Vui Kong*, *supra* note 51 at para. 78. This is a basic reiteration of the 'rule of law' principle in *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 S.L.R.(R.) 525 (C.A.) [*Chng Suan Tze*] and may be contrasted with Chua J.'s positivist apprehension of the meaning of 'law' as reflected in the definition of the 'rule of law' as any validly enacted law, shorn of association with a substantive principle in *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 S.L.R.(R.) 461 at para. 48 (H.C.). Chan C.J. in *Yong Vui Kong*, *supra* note 51 at para. 78, further observed that outside of the *ISA* decisions, the "full amplitude" of the *Chng Suan Tze* principle was "left untouched" by Parliament when it amended the *Constitution* to include the current art. 149(3), thus "implicitly" endorsing the *Chng Suan Tze* principle.

Indeed, the striking down of legislation as a constitutional power, after the seminal U.S. Supreme Court decision of *Marbury v. Madison*,[85] was declared to be rooted in the 'rule of law' by the Court of Appeal:[86]

> Questions on the constitutionality of our laws and whether they have been enacted ultra vires the powers of the legislature are matters of grave concern for our nation as a whole. 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.

In principle, as Chan C.J. observed in *Yong Vui Kong*:[87]

> [B]y virtue of the judicial power vested in the Supreme Court under Art 93 of the Singapore Constitution, the Supreme Court 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. In any modern State whose fundamental law is a written Constitution based on the doctrine of separation of powers (*ie*, where the judicial power is vested in an independent judiciary), there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded.

However, there are instances where by dint of the reasons underlying the doctrine of non-justiciability, the courts will refrain from review or apply a calibrated model of limited review, in seeking to accommodate and reconcile the 'rule of law' with the doctrine of separation of powers. These reasons may include matters of institutional competence, such as where courts are unsuited to handle polycentric matters, the nature of the decision which implicates subjective policy preferences and where political methods of accountability are most appropriate to controlling the executive, in relation to high policy decisions such as treaty-making or recognising foreign governments, which bear foreign relations implications.[88]

In the absence or limited presence of judicial review, alternative checks and balances may be emplaced, such as the Advisory Board and Elected President in relation to preventive detention orders.[89] Whether these are as effective as judicial controls is open to question, as the efficacy of political constitutionalism turns upon a vibrant form of politics in which "those who engage in scrutinising government acts must be sufficiently independent of the government of the day and able to act with rigour and vigour".[90] One reason why regimes such as the one in the *MRHA* limits judicial

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85 5 U.S. (1 Cranch) 137 (1803).

86 *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R.(R.) 489 at para. 89 (C.A.).

87 *Yong Vui Kong*, *supra* note 51 at para. 31.

88 *Lee Hsien Loong v. Review Publishing Co Ltd* [2007] 2 S.L.R.(R.) 453 at paras. 95, 96 (H.C.).

89 Every person detained under the *ISA* shall be entitled to make representations to an advisory board (*ISA*, *supra* note 82, s. 11), which shall within three months consider such representations and make recommendations to the President (*ibid.*, s. 12(1)), upon which consideration the President may give the Minister such directions as he thinks fit (*ibid.*, s. 12(2)). Every detention shall be reviewed by an advisory board at intervals not more than 12 months (*ibid.*, s. 13(1)) and make such recommendations as it thinks fit (*ibid.*, s. 13(2)). Where any advisory board recommends release, the person shall not be detained or further detained without President's concurrence (*ibid.*, s. 13A). With regard to the President particularly, the President must be satisfied under s. 8(1) before detention is ordered.

90 Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 42.

review is the fear that an open court proceeding would exacerbate heightened emotions, such that issuing non-justiciable restraining orders or soothing ruffled feathers through quiet diplomacy is the preferred *modus operandi*. It may also reflect the priorities of a brand of relational constitutionalism whose concerns transcend a mere keeping of the peace in favour of the quality of the peace kept, with the primary goal of sustaining durable relationships. For example, one may argue that to secure not just tolerance but an affective solidarity, dialogical models are employed to address or diffuse instances of religious disharmony between religious groups, such as through the form of the Presidential Council of Religious Harmony; this is composed primarily of religious leaders and advises the President on whether to give his assent or otherwise in relation to the issuance of a gag or restraining order by the Minister under the *MRHA*.[91] By developing relationships, a form of social capital is built such that when a crisis erupts, interested parties already know each other, which enhances the prospects of a conciliatory rather than adversarial spirit in resolving upset relations.

C. *'Paternal Democracy' and Mixed Constitutionalism*

In contextualising Singapore, it is useful to appreciate the nature of the political culture and the constitutional order it infuses through the idea of 'paternal democracy', where both political and legal forms of constitutionalism co-exist in regulating public power, in a context where law is variously viewed as both a tool for constraining and for facilitating power.

'Paternal democracy' is a useful framing device for understanding the brand of constitutional democracy practised in Singapore, which is distinct from Western liberal democracy; as Fareed Zakaria has suggested, "might prove to be not the final destination on the democratic road, but just one of the many possible exits".[92] There is a spectrum of democratic orders, ranging from the liberal to non-liberal or illiberal, and whether a version of Singapore liberal, non-liberal or illiberal democracy is identifiable or will emerge bears investigation.[93] A more accurate descriptor is the term "mixed constitutionalism" which recognises degrees of liberality and takes into account the fact that all constitutional orders have liberal and illiberal elements.[94] For example, the freedom of religious profession in Singapore is healthy in the liberal sense, as the local brand of "accommodative secularism" has been described

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91 See Li-ann Thio, "Relational Constitutionalism and the Management of Inter-Religious Disputes: The Singapore 'Secularism with a Soul' Model" (2012) 1 (2) Oxford Journal of Law and Religion 446; Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 21, 22.

92 Fareed Zakaria, "The Rise of Illiberal Democracy" (1997) 76:6 Foreign Affairs 22 at 24.

93 The government has avoided blindly adopting foreign models: See Shanmugam, "New York Bar Association Speech", *supra* note 38 at para. 51, where he states that "[w]e regularly read prescriptions from some in developed countries to some 3rd World states: hold elections, have a free press (which usually means control of the press by a few wealthy individuals), have a Parliament, have the full suit of Constitutional Liberties: that is, take the Western Liberal model of government and apply it—without regard to the state of the society, the poverty and literacy levels, whether the people are empowered enough to work the levers of such a democracy. The result: you repeatedly see endemic corruption, concentration of power in the hands of a few, no progress in society—failed/failing states."

94 Graham Walker, "The Mixed Constitution after Liberalism" (1996) 4 Cardozo J. Int'l & Comp. L. 311 at 320; Beau Breslin, *The Communitarian Constitution* (Baltimore: John Hopkins University Press, 2004) at 183, 186-188 (considering both the German and Israeli constitution as semi-liberal).

thus: "[T]he protection of freedom of religion under our Constitution is premised on removing restrictions to one's choice of religious belief".[95] This rests on the principle of free conscience. However, the restrictions on religious expression could be described as non-liberal or illiberal, as where laws regulating the registration of societies are used to ban groups like the Jehovah's Witnesses because their pacifist beliefs oppose the national military service policy.[96]

I distinguish 'paternal' (a relational term) from 'paternalistic' (a "father knows best" ideology or mindset) and suggest that 'paternal democracy' captures the changing nature of the relationship between the Singapore government and the governed as reflected in the government's self-perception, institutional developments, the rules of engagement with respect to the conduct of public debate which are in flux, and even judicial *obiter*. Indeed, this idea of gradual or incremental change is inherent in the 'Asian values' debate of the early 1990s, where Singapore's development-oriented state prioritised economic development and growth, where the prescription was that political stability, combined with a legal environment that protected property rights and ensured commercial certainty, was integral to achieving economic take-off.[97] This was to be achieved by discipline, rather than rambunctious democracy, and through curtailing an over-robust exercise of civil and political rights. An over-emphasis on individual rights was considered counter-productive and threatening to public order, a chief component of which was the maintenance of social harmony in a multi-racial, religiously diverse polity. Implicit in this 'trade off' theory was the understanding that as a society achieved human development and political maturity, political liberalisation would ensue:[98]

> In the early phase of a country's development, too much stress on individual rights over the rights of the community will retard progress. But as it develops, new interests emerge and a way to accommodate them must be found. The result may well be a looser, more complex and more differentiated political system… The Singapore government is accountable to its people through periodic secret and free elections. But we do not feel guilty because the opposition parties have consistently failed to win more than a handful of seats. We have made alternative arrangements to ensure a wide spectrum of views is represented in our Parliament through non-elected Members of Parliament and put in place other channels for good communication between the Government and the people.

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95 *Nappalli Peter Williams v. Institute of Technical Education* [1999] 2 S.L.R.(R.) 529 at para. 28 (C.A.).

96 *Colin Chan*, *supra* note 66.

97 See Yong Pung How C.J., (Speech delivered at the Legal Service Dinner, 6 April 2001), online: Subordinate Courts, Singapore <http://app.subcourts.gov.sg/Data/Files/File/eJustice/Archives/CJSpeech_LegalServiceDinner2001.pdf>, where he states that "Singapore is a nation which is based wholly on the Rule of Law. It is clear and practical laws and the effective observance and enforcement of these laws which provide the foundation for our economic and social development. It is the certainty which an environment based on the Rule of Law guarantees which gives our people, as well as many MNCs and other foreign investors, the confidence to invest in our physical, industrial as well as social infrastructure."

98 Ministry of Information & The Arts, Singapore Government Press Release, 20/JUN, 09-1/93/06/16, "Statement by Mr Wong Kan Seng, Minister for Foreign Affairs of the Republic of Singapore, The Real World of Human Rights" (16 June 1993), online: Speech-Text Archival and Retrieval System, National Archives of Singapore <http://stars.nhb.gov.sg/stars/public/viewDocx.jsp?stid=28261&lochref=viewPDF-body.jsp?pdfno=19930616-MFA.pdf&keyword=real>, also reproduced in "Singapore and International Law" [1993] Sing. J.L.S. 602 at 609.

Former Prime Minister ("PM") Goh Chok Tong has described himself as an "elder brother" whose task was to persuade Singaporeans "to accept the house rules of the family".[99] In contrast, he likened former PM Lee Kuan Yew as a "stern father". Singaporeans were admonished by senior Cabinet officials in the mid-1990s not to adopt an attitude of "*boh tua boh sway*" in addressing political leaders in public debate, which required the recognition of a distinction between the senior and junior party; this hierarchical, feudal orientation is at odds with the democratic precept of equality.[100] Notably, these developments took place in an era where the parliamentary opposition was so small that it reached its peak in 1991 when four opposition members were voted into an 81-seat House.[101]

Things have changed in the 21st century. Its first decade saw two General Elections in 2006 and 2011, with the PAP winning strong majorities of 82 of 84 (66.6% of the total votes cast)[102] and 81 of 87 elective seats (60.1% of the total votes cast)[103] respectively. The "watershed" 2011 General Elections ushered in a "new normal" of a re-politicised political landscape; for the first time since its introduction in 1988, the ruling PAP lost a multi-member Group Representation Constituency ("GRC") when the Worker's Party seized the five-member Aljunied GRC (54.7%), unseating two Cabinet ministers and ushering in five opposition Members of Parliament ("MPs"). The GRC scheme, which requires political parties to field a team composing of at least one member from a stipulated minority group to entrench multi-racialism, has been criticised as a method for perpetuating the PAP stronghold and stultifying the growth of a parliamentary opposition even though as a vehicle for electoral contests, the GRC is "neutral".[104] Its nature as a double-edged sword (where with the loss of a GRC, up to six parliamentary seats can be lost in one fell swoop), working to the detriment of the incumbent, was finally demonstrated 13 years after its inception.

The psychological effect of seeing incumbent Cabinet ministers defeated at the polls perhaps explains the third PM Lee Hsien Loong's post-election admonition to newly-elected MPs: "There is no tenure or job security in politics."[105] An unfamiliar humility was evident in PM Lee's delivery of an apology during the hustings[106] for

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99 Bertha Hanson, "PM Goh on his role as 'elder brother'" *The Straits Times* (20 October 1994) 4.

100 "Debate yes, but do not take on those in authority as 'equals'" *The Straits Times* (20 February 1995) 19. Minister for Information and the Arts, George Yeo, reportedly stated that one must remember one's place in society before engaging in political debate. Minister Yeo was voted out of office in the 2011 General Elections.

101 The PAP won 77 seats, the Singapore Democratic Party, three seats and the Worker's Party, one seat: Parliamentary General Election 1991 Seats, online: Singapore Elections <http://www.singapore-elections.com/parl-1991-ge/seats.html>.

102 Parliamentary General Election 2006 Votes, online: <http://www.singapore-elections.com/parl-2006-ge/votes.html>.

103 Parliamentary General Election 2011 Votes, online: <http://www.singapore-elections.com/parl-2011-ge/votes.html>.

104 Koh Buck Song *et al.*, "GRC Changes: Are they intended to fix the opposition?" *The Straits Times* (29 October 1996) 20. PM Goh asserted that "[the GRC scheme was] objectively, theoretically, if you like, scientifically neutral. The key [wa]s who c[ould] produce the better team."

105 Letter from the Prime Minister's Office to all PAP MPs reported in "PM Lee's letter to MPs" *Asiaone News* (28 May 2011), online: Asiaone News <http://www.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110528-281111.html> at para. 34 ["PM Lee's Letter to MPs"].

106 Feng Yen, "PM says sorry over mistakes, pledges to do better" *The Straits Times* (3 May 2011), online: The Straits Times <http://www.straitstimes.com/GeneralElection/News/Story/STIStory_664140.html>.

mistakes made.[107] This seems to have sparked a culture of apologising where errors are made, with ministers and leaders following their party leader in relearning the rules of political engagement in an evolving landscape.[108]

At the 2011 swearing-in ceremony, PM Lee demonstrated responsiveness in promising a review of the millionaire salaries of high officeholders which has long caused public disquiet. The Prime Minister's Office stated that ministerial salaries "should have a significant discount to comparative private sector salaries to signify the value and ethos of political service".[109] While promising "inclusive dialogue", he urged that politics not become confrontational or divisive.[110] The stress is now on public servant-hood[111] and avoiding a sense of lording over the people.[112] With economic prosperity comes a more literate and highly educated citizenry which is more demanding in terms of participation in public affairs, though not necessary in a mature manner where rudeness, vitriol and sloganeering fall short of aspirational standards of civil, rational and informed debate, particularly in cyberspace.[113] This thwarts democratic debate insofar as the cacophony in new media is such that the "truth is not easily distinguished from misinformation. Anonymity is often abused. Harsh, intemperate voices often drown out moderate, considered views."[114]

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[107] Mistakes cited including letting detained terrorist Mas Selamat escape and the Orchard Road floodings: Shawn Lee Miller, "PM: Why I said sorry" *Asiaone News* (5 May 2011), online: Asiaone News <http://www.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110505-277335.html>.

[108] Paul Lim, "Health minister apologises for HSA's DNA lab error" *Asiaone News* (6 January 2012), online: Asiaone News <http://news.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20120106-320291.html>; Fann Sim, "MP Lim Wee Kiak apologises for comments on pay" *Yahoo News* (26 May 2011), online: Singapore Scene <http://sg.news.yahoo.com/blogs/singaporescene/reasonable-pay-help-maintain-bit-dignity-084833549.html>; "MP Seng Han Thong apologises for comment about SMRT staff" *Asiaone News* (22 December 2011), online: Asiaone News <http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20111222-317693.html>; Hoe Yeen Nie, "Baey Yam Keng apologises for comments over foreign student's remark" *Channel Newsasia* (28 February 2012), online: Channel Newsasia <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1185817/1/.html>.

[109] Lina Yang, "Singapore to review officials' pay" *English Xinhuanet* (23 May 2011), online: English Xinhuanet <http://news.xinhuanet.com/english2010/world/2011-05/23/c_13889065.htm>.

[110] Lee Hsien Loong, (Speech by Prime Minister Lee Hsien Loong at the Swearing-in Ceremony Held in the State Room, Istana, 21 May 2011), online: <http://www.channelnewsasia.com/annex/Speech%20by%20PM%20Lee.pdf>.

[111] "PM Lee's Letter to MPs", *supra* note 105 where PM Lee stated: "Singapore is in a new phase of its political development. The PAP government has to operate and govern in a different way than before. But two things should not change. First, we must always hold fast to the spirit of service to the people, and work hard on their behalf. Second, we must never compromise the high standards of honesty and integrity, which have enabled the PAP to keep trust with the people all these decades."

[112] Ewen Boey, "MPs tell residents: No need to stand, clap for us." *Yahoo News* (19 June 2011), online: Singapore Scene <http://sg.news.yahoo.com/blogs/singaporescene/mps-tell-residents-no-stand-clap-us-050005362.html>. Post-2011, PAP MPs now encourage their residents not to greet them with excessive formalities or fanfare with garlands, lion dances or a large entourage, in the spirit of public service.

[113] Sing., *Parliamentary Debates*, vol 84, col. 1125 (28 Feb 2008) (Wong Kan Seng) ("We see more divergent views expressed through various avenues. This includes the press, Internet, various forums as well as letters and emails from individuals and groups directly to the Government and political leaders, like Ministers. I have received many such letters and emails of grievances or strong views about what we do or what we should do. Some are polite, some are very rude. But all are read and looked into.").

[114] Tony Tan Keng Yam, "A Home We Share, A Future We Build Together" (Address delivered at the Opening of the 12th Parliament at Parliament House, 12 October 2011), online: Istana Singapore

The government has taken steps to accommodate these demands for political participation in various ways, as the father-child relationship (paternalism) gives way to one of governor-governed as democratic equals at an evolutionary pace. It has sought to do this through creating the constitutional office of non-elected MPs, a Speaker's Corner where public free speech may take place without permit,[115] encouraging citizen participation in public issues. Just before taking office in 2004, PM Lee Hsien Loong delivered a speech urging citizens not to be "passive bystanders" but to "debate issues with reason, passion and conviction."[116] This was to "rais[e] the level of engagement between government and people" through serious debate on national issues, "based on facts and logic," not emotionalism, to reach "correct conclusions".[117] This, he said, was preferable to having "an apathetic society with no views".[118] Political space was opened up for discussing matters pertaining to social mores as the government would pull back from "being all things to all citizens" and be "increasingly guided" by community consensus "on questions of public morality and decency".[119] Nonetheless, certain matters such as security, foreign policy and tax were not "amenable to public consultation", because of secrecy issues or market sensitivity.[120]

This marks a shift away from an exclusive focus on "material progress" to an appreciation of the need to show solicitude for the intangibles, for "our values and ideals",[121] as part of a common identity needed for unifying the nation and orienting the polity towards the common good.[122]

An 'autocratic democracy' silences dissent whereby grievances go underground, simmer and fester. The PAP government has taken steps to manage and deal with dissent. To the extent that political constitutionalism is a key facet of Singapore constitutionalism, this is significant insofar as it buttresses the capacity of political methods of control to hold government to account and to vindicate representative, responsive democracy. The Court of Appeal observed, in relation to whether a new defence of qualified privilege to political libel should be recognised, that in future cases, it would have to evaluate whether the political changes reflected in the decisions to increase the number of non-constituency MPs, to institutionalise the Nominated MP scheme and to liberalise the *Films Act*,[123] were significant enough to warrant the adoption of such a defence.[124] This reflects an awareness that changes in the political landscape may warrant greater protection of democratic values in relation to speech critical of politicians and those who hold public office. Things are in flux and the

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<http://www.istana.gov.sg/content/istana/news/speeches/address_at_the_openingofthe12thparliament.html> ["A Home We Share"].

115 *Treatise on Singapore Constitutional Law*, *supra* note 46 at 845-847.

116 Lee Hsien Loong, "Building a Civic Society" (Speech delivered at the Harvard Club of Singapore's 35th Anniversary Dinner, 6 January 2004), online: United Nations <unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015426.pdf> ["Building a Civic Society"].

117 *Ibid.*

118 *Ibid.*

119 *Ibid*. Also see Thio Li-ann, "Can we disagree without being disagreeable?" *The Straits Times* (26 October 2007).

120 Lee, "Building a Civic Society", *supra* note 116.

121 Tan, "A Home We Share", *supra* note 114.

122 Lee, "Building a Civic Society", *supra* note 116.

123 Cap. 107, 1998 Rev. Ed. Sing.

124 *Review Publishing (2010)*, *supra* note 75 at para. 274.

previous equilibrium established by the 'trade off' theory, stability for growth, may be shifting and should impact legal development.

III. Political Speech, Defamation and the Courts

One of the most persistent 'rule of law'-related critiques against Singapore relates to the treatment of political speech by the courts, within the specific fields of political libel and the contemptuous offence of "scandalising the court", which are both recognised exceptions to the art. 14 guarantee of free expression.

The criticisms are framed in this vein: Insufficient protection is given to free speech, in favour of the reputational interests of politicians or of the courts in relation to public confidence in the administration of justice. With specific reference to political defamation, the excessively high damages awarded have had the deleterious effect of further unduly 'chilling' speech.

This is accompanied by allegations of judicial bias in favour of the government, or judicial complicity in facilitating the use of litigation against political opponents to bankrupt and so politically cripple[125] them.[126] The U.N. Special Rapporteur on the independence of judges and lawyers in 1996 issued a report opining that this perception could stem from "the very high number of cases won by the Government or members of the ruling party in either contempt of court proceedings or defamation suits brought against critics of the Government, be they individuals or the media".[127] The courts were thus accused of maintaining a *statist* 'rule of law' through such decisions. That this was the general perception amongst critical circles may explain why Rajendran J. in *Goh Chok Tong v. Jeyaretnam Joshua Benjamin*[128] felt the need to state that Singapore had "an open system of justice" where there were "no private directives to a judge from the executive or from anyone else on how a case is to be conducted."[129]

More recently in 2008, the International Bar Association which describes itself as "the global voice of the legal profession"[130] noted, of cases involving defamation claims made by PAP officials: "[T]he slim likelihood of the successful defence of an action, combined with the extraordinarily high damages awarded in defamation cases involving PAP officials sheds doubt on the independence of the judiciary in these cases".[131]

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[125] Art. 45 of the *Constitution*, *supra* note 64, provides that an undischarged bankrupt is disqualified from membership in Parliament. Persons convicted of an offence in a court of law in Malaysia and Singapore and sentenced to imprisonment for a term of not less than one year or to a fine of not less than S$2,000 are also disqualified.

[126] See *e.g.*, Francis T. Seow, *Beyond Suspicion? The Singapore Judiciary* (New Haven, Connecticut: Yale Southeast Asia Studies, 2006); Tey Tsun Hang, "Criminalising Critique of the Singapore Judiciary" (2010) 40 Hong Kong L.J. 751; Tey Tsun Hang, "Judicial Internalising of Singapore's Supreme Political Ideology" (2010) 40 Hong Kong L.J. 293; Christopher Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Australia: Scribe Publications, 2004); Cassandra Chan, "Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws" (2003) 26 Loy. L.A. Int'l & Comp. L.J. 315.

[127] Param Cumaraswamy, "Report of the Special Rapporteur on the Independence of Judges and Lawyers" UN Doc. E/CN.4/1996/37 at para. 218.

[128] [1997] 3 S.L.R.(R.) 46 (H.C.).

[129] *Ibid.* at paras. 31, 32.

[130] See "Prosperity versus Individual Rights?", *supra* note 4 at 1.

[131] *Ibid*. at 59.

More bluntly, the Lawyers' Rights Watch Canada has stated that "the twin swords of defamation and bankruptcy law effectively allow the PAP to silence and eliminate members of the opposition."[132] This author has also been critical of the cases on contempt of court and political libel for the under-protection of free speech and the relatively cursory reasons given to justify the valorisation of reputational rights.[133]

Two matters of concern in relation to political libel are worth highlighting in terms of adjudicating free speech and reputational interests.

First, the rejection of the reasoning behind the 'public figure' doctrine that politicians should be "thicker-skinned" and more tolerant of criticism, given the public interest in them and how they discharge their office, by according free speech greater weight, is deeply unsatisfactory. This was exacerbated by the Singapore variant of the 'public figure' doctrine as applied, not with respect to liability for political libel but to determining the quantum of damages. In *Tang Liang Hong v. Lee Kuan Yew*[134] 13 members of the ruling PAP sued Tang, an opposition politician, for libel. A total of S$5.8 million was awarded. Thean J.A. rejected counsel's argument that damages be moderated because the case had a political flavour or involved politicians, on the basis that the *Constitution*'s art. 12 equal protection clause would be violated by giving less protection to politicians than to private individuals. Both were to be treated on the basis of parity. However, with respect to computing damages, later decisions such as *Goh Chok Tong v. Chee Soon Juan*[135] did not treat politicians and private persons on an equal standing as higher damages were awarded where a "prominent public [figure]"[136] was involved, to vindicate the public reputation and sustain the moral authority of political leaders. In this respect, a private person enjoys less protection than a public figure.

Second, lopsided attention is given to the public interest of ensuring that "sensitive and honourable men" are not deterred from seeking public office where insufficient protection is given to their reputation,[137] such as where the publisher of a defamatory statement enjoys an over-extensive privilege. Without discounting the importance of reputational interests or of not dissuading good people from entering politics, there is also a public interest in the robust protection of speech critical of politicians, stemming from both the argument from truth and from democracy.[138] Certainly from the 1992 leading case of *Lee Kuan Yew* till about the tail end of the 21st century's first decade, this critique could be levied at the cases.

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[132] Kelley Bryan, "Rule of Law in Singapore: Independence of the Judiciary and the Legal Profession in Singapore", online: Singapore Democratic Party <http://www.singaporedemocrat.org/LRWC.Rule.of.Law.in.Singapore.17.Oct.07.pdf>. See also Tey Tsun Hang, "Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Impact on Political Speech" (2008) P.L. 452.

[133] 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" (2006) 19 Colum. J. Asian Law 428 at 461-475.

[134] [1997] 3 S.L.R.(R.) 576 (C.A.).

[135] [2005] 1 S.L.R.(R.) 573 at para. 72 (H.C.).

[136] *Ibid*. at paras. 42, 72.

[137] *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 S.L.R.(R.) 791 at para. 64 (C.A.) [*Lee Kuan Yew*].

[138] Thio, *Treatise on Singapore Constitutional Law*, *supra* note 46 at 751-753, 754-756.

However, during the third Chief Justice Chan Sek Keong's tenure from 2006, there have been significant developments in art. 14 jurisprudence.[139] These relatively recent developments, both in *ratio* and *obiter*, have not been taken into account in the earlier academic literature or policy critiques, or have been ignored or given short shrift,[140] consequently failing to give an accurate picture of the evolving position in Singapore. Key points in relation to political libel are highlighted below, which should provide grist to the mill in terms of evaluating the future trajectory of judicial developments in this field. One will be better positioned to evaluate criticisms of how the courts have allegedly accepted "the government's politics of communitarian legalism" through the "judicial normalization of a statist rule of law" as manifested in deploying defamation law to chill political opposition.[141]

One may observe that while an appeal to statist values would fall into the category of an apology for power, in buttressing state power and immunising governors from all critique, 'communitarianism' (as opposed to statism) is a valid choice of political philosophy to shape a constitutional order; this is provided that there is general, authentic social consensus that this serves the common weal of the polity, as community values cannot be unilaterally declared by governors without the filter and check of deliberative democratic dialogue. Furthermore, to merely invoke the banner of "cultural relativism"[142] to damn a court's rejection of foreign cases or standards in an unratified treaty does not pass analytical muster as it is merely rhetorical in assuming the superiority of a prescription, which itself may be the product of a form of cultural parochialism and susceptible to a charge of cultural hegemony;[143] there is room for legitimate cultural particularities and for the application of a global margin of appreciation in how courts negotiate issues like the scope of free speech. Of course, it is equally unsatisfactory where a court or governor invokes "local conditions" or "four walls" as a bare rhetorical banner to reject arguments; what is desirable is that reasons rather than rhetorical flourishes be given, in the interests of transparency and accountability, so that these can be evaluated on their merits or deficiencies. It is clear that some of the later cases emanating from the Singapore bench manifest a culture of reasons-giving as opposed to cursory statements about textual differences, bare invocation of local conditions or one-sided public order trumps. While the

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139 For an analysis of these developments, see Thio Li-ann & David Chong Gek Sian, "The *Chan* Court and Constitutional Adjudication—A Sea Change into Something Rich and Strange?" in Chao Hick Tin *et al.*, eds., *The Law in His Hands—A Tribute to Chief Justice Chan Sek Keong* (Singapore, Academy Publishing, 2012) 87.

140 See Cameron Sim's cursory and un-illuminating treatment of *Attorney-General v. Tan Liang Joo John* [2009] 2 S.L.R.(R.) 1132 (H.C.) [*Tan Liang Joo*], and his complaint that the court in dismissing defences to libel in *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 S.L.R.(R.) 675 at 684, 685, took "an overwhelmingly black letter law approach by omitting to pay due regard to all relevant circumstances": Cameron Sim, "The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law" (2011) 20 Pac. Rim L. & Pol'y J. 319 at 333. Sim argues at 334 that free speech limits, including press regulations are "easily enforceable" because Singapore is not party to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [*ICCPR*], which is over-simplistic and assumes that the *ICCPR* has clear, uncontested standards, should be ratified, and if ratified, would make a practical difference in domestic practice.

141 Sim, *ibid.* at 352.

142 *Ibid.* at 330, 333.

143 See Teemu Ruskola, "Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law" (2011) 44 U.C. Davis L. Rev. 879 (on the idea of decentring the centre).

final decision may be displeasing to certain critics, particularly those who champion the western brand of liberal values (other brands may exist), any serious scholar would grapple with these later cases. One could evaluate whether what has emerged does constitute a sea change, a worthy "particularism without parochialism" or is really just a continued perpetuation of statist values, producing a 'softer' but still authoritarian 'rule of law' where purported change is mere style over substance.

A. *Political Libel: Changes in Relation to the Under-Protection of Free Speech and Valorisation of Reputational Interests?*[144]

The Court of Appeal in *Review Publishing (2010)*[145] neither adopted a new defence of qualified privilege nor extended the existing one set out in *Aaron Anne Joseph v. Cheong Yip Seng*[146], which requires that a publisher has a duty to communicate, and the hearer, an interest in receiving such information; no such media privilege in the form of a general duty to communicate has been recognised though it may be established on "special facts".[147] It extensively discussed, in *obiter,* the broader qualified privilege defence articulated by the House of Lords in *Reynolds v. Times Newspaper*[148] and considered its future application in a case where a citizen's rights to free speech was at stake. In the instant case, the litigant was a non-citizen who was not entitled to a constitutional right to free speech, only the lesser common law liberty to speak.[149]

The court opined that art. 162 of the *Constitution* did not require the "reading up" of free speech where balanced against reputational interests.[150] Article 162 provides that after the commencement of the *Constitution*, all existing laws shall continue in force and 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."[151] In other words, it considered that there was no constitutional standard that required recalibrating the balance struck at common law (as modified by the *Defamation Act*[152]) in balancing political speech against reputational interests. It considered the effect of the precursor to art. 162 and art. 105(1) of the 1963 *State Constitution*, characterising this not as an "adjustment" clause but as a "law-enacting provision".[153] This "ratified" or continued the existing law of defamation which restricted free speech, providing that the existing balance was the appropriate balance. It reasoned that otherwise, all existing laws covering matters relating to art. 14 (*viz*. speech, assembly and association) would at the date of the *Constitution*'s commencement be unconstitutional until Parliament enacted fresh legislation to restrict art. 14 rights.[154] The courts have declined to take the

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144 See Ian Loveland, *Political Libels: A Comparative Study* (Oxford: Hart Publishing, 2000).
145 *Supra* note 75 at para. 297.
146 [1996] 1 S.L.R.(R.) 258 (C.A.).
147 *Review Publishing (2010)*, *supra* note 75 at para. 49.
148 [2001] 2 A.C. 127 (H.L.) [*Reynolds*].
149 *Review Publishing (2010)*, *supra* note 75 at para. 257.
150 *Ibid.* at paras. 250-252.
151 *Ibid.* at para. 249.
152 Cap. 75, 1985 Rev. Ed. Sing.
153 *Review Publishing (2010)*, *supra* note 75 at para. 250.
154 *Ibid*. at para. 251.

route of reading the constitutionalisation of a former common law residual liberty as a technique that requires re-balancing speech and reputation in favour of speech, preferring continuity to rupture.

This does not mean that the law is static as "the common law nowhere stands still"[155], or that the defence of qualified privilege which serves "the common convenience and welfare of society"[156] will never develop, as the categories of this defence are not closed. Indeed, the court indicated as much, identifying at least two further gateways through which the *Reynolds* privilege, or an inspired variant thereof, might attain to judicial endorsement.

First, it was argued that changing political conditions and values might warrant the application of the *Reynolds* rationale to Singapore citizens concerning publications of public interest. Specifically, reference was made to government initiatives "to increase the number of Non-Constituency Members of Parliament, institutionalise the Nominated Members of Parliament scheme and relax certain restrictions under the Films Act", which were political developments indicative of a desire "to provide greater accountability and transparency in the political system as well as to encourage democratic participation in the political affairs of Singapore", where to "follow suit", the courts should adopt the *Reynolds* privilege.[157] The Court of Appeal indicated that a subsequent court would have to evaluate "whether these developments are sufficient evidence of a change in [Singapore's] political, social and cultural values" to support the broadening of qualified privilege.[158]

Second, the court indicated that it was not closed to striking a "new balance" between constitutional free speech and reputational interests, in developing the common law of defamation with a liberalising intention.[159] It did note that according to the terms of art. 14(2)(a), Parliament had the "final say" in how to strike this balance.[160] Inspiration could be drawn from the *Reynolds* privilege of 'responsible journalism' as sketched out by Lord Nicholls's ten non-exhaustive guidelines.[161] It drew a functional analogy between the English reason for adopting the test in noting that the common law right of free speech in the United Kingdom ("U.K.") was elevated by art. 10 of the *ECHR* and s. 12 of the *HRA* to "a right based on a constitutional or higher legal order foundation".[162] It was this changed status that accounted for the attribution of a "greater weight" to free speech compared to the protection of reputation and a readjustment of the balance.[163] As the *Reynolds* privilege is "not a natural common law development",[164] the adoption of its rationale would rest not on the common law but on art. 14 which also rests on a higher legal order foundation.[165] This process would involve making value judgments drawing from local political and

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155 *Reynolds*, *supra* note 148 at 222.
156 *Toogood v. Spyring* (1834), 1 C. M. & R. 181; 149 E.R. 1044 (Ch.) at 1050 (Parke B.).
157 *Review Publishing (2010)*, *supra* note 75 at para. 274.
158 *Ibid.*
159 *Ibid.* at para. 297.
160 *Ibid.* at para. 270.
161 *Reynolds*, *supra* note 148 at 205.
162 *Ibid.* at 208 (Lord Steyn), referred to in *Review Publishing (2010)*, *supra* note 75 at para. 199.
163 *Review Publishing (2010)*, *ibid*.
164 *Ibid.* at para. 261.
165 *Ibid.* at para. 264.

social conditions.[166] A distinctive factor, in the court's opinion, was that there was in Singapore's political context "no room… for the media to engage in investigative journalism which carries with it a political agenda".[167] It cited no authority beyond ministerial statements, which reflects recourse to "soft constitutional law"[168] as part of the lens through which the *Constitution* is read.

The case law also indicates some theorising of the values underlying the competing rights. Should the *Reynolds* privilege be adopted or adapted in Singapore, its evolution may be affected by the view that free speech and reputation may be co-equal rights, for which there is "a discernible incipient recognition" in the English context.[169] The view that false statements are of no value as "there is no interest in being misinformed"[170] resonates with the local political culture which "places a heavy emphasis on honesty and integrity in public discourse on matters of public interest."[171] This indicates an understanding that free speech is not an end in itself but a means to an end, whether of truth or democratic deliberation, which misinformation undermines rather than facilitates.

Lastly, an important observation is the Court of Appeal's expressed view that the values underlying the *Reynolds* privilege could be applied by holding the speaker liable for defamation "but adjusting the quantum of damages payable, with the exact amount to be paid in each case being calibrated by the court in proportion to the degree of care which the defendant has taken (or failed to take) to ensure that what he publishes is accurate and fit for publication."[172] This has "the merit of deterring irresponsible journalism" while moderating the amount of damages a plaintiff who has satisfied the "responsible journalism" test is liable to.[173]

The courts have rejected the award of symbolic damages, as the function of damages for libel is consolation for distress, reparation of reputational harm and to vindicate honour, reputation, and moral authority.[174] Reputation is given great weight and theorised as a form of honour, characteristic of a "deference society".[175] Ang J. in *Lee Hsien Loong v. Singapore Democratic Party*[176] noted that defamation law "presumes the good reputation of the plaintiff". Ang J. quoted the Greek rhetorician, Isocrates, who noted that "the stronger a man's desire to persuade his hearers, the more zealously will he strive to be honourable and to have the esteem of his fellow-citizens."[177] Thus, "the good reputation of an individual (meaning, his character), is of utmost importance to one's personal and professional life for

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166 *Ibid.* at para. 271.
167 *Ibid.* at para. 272.
168 Li-ann Thio, "Soft Constitutional Law in Non-liberal Asian Constitutional Democracies" (2010) 8 Int'l J. Const. L. 766; *Review Publishing (2010)*, *ibid.* at paras. 277, 278.
169 *Ibid.* at para. 293.
170 *Reynolds*, *supra* note 148 at 238 (Lord Hobhouse).
171 *Review Publishing (2010)*, *supra* note 75 at para. 285. This view was substantiated by reference to a ministerial statement.
172 *Jameel (Mohammed) v. Wall Street Journal Europe* [2007] 1 A.C. 359 at para. 32 (H.L.) (Lord Bingham).
173 *Review Publishing (2010)*, *supra* note 75 at para. 297.
174 *Arul Chandran v. Chew Chin Aik Victor* [2001] 1 S.L.R.(R.) 86 (C.A.).
175 Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Cal. L. Rev. 691 at 702.
176 [2009] 1 S.L.R.(R.) 642 at para. 102 (H.C.).
177 *Ibid.*

human proclivity is such that people are apt to listen to those whom they trust."[178] This is reflected in the greater quantum of damages awarded to politicians and public leaders, in the fourfold tier set forth by the Court of Appeal in *Lim Eng Hock Peter v. Lin Jian Wei.*[179]

The Court of Appeal noted that the subject of the amount of damages awarded for defamation "appears to be continually misrepresented or misunderstood by some sections of the public in Singapore".[180] Comparatively speaking, it insisted that damages were not excessive, explaining the basis for computing damages and justifying the differentiation between categories of plaintiffs for this purpose. Some of the applicable principles are worth highlighting, as is the observation that in foreign jurisdictions such as Australia, New Zealand, Canada and the U.K., expanded common law defences of qualified privilege have not been accompanied by a conscious reduction of damages awarded to political figures. The assessment of damages in such courts turn on all case circumstances, with the goal of ensuring not only that damages do not represent a "cornucopia" or "road to untaxed riches", but are also not lowered to a point "publishers might with equanimity be tempted to risk having to pay".[181]

First, the position, standing and conduct of the plaintiff and defendants are relevant factors in calculating damages, as is having an effective deterrent effect, which distinguishes libel cases from personal injury damages. Second, Singapore law unlike English law does not consider token damages sufficient to vindicate the claimant's reputation.[182] Third, a distinction is to be drawn between "public leaders" and "ordinary individuals", such that where the former is defamed, higher damages are awarded.[183] This is because of the "greater damage" done to them not only personally but to affiliated institutions.[184] The Court of Appeal stated that "[p]ublic leaders [were] generally entitled to higher damages… because of their standing in Singapore society and devotion to public service".[185] "Public leaders" include both political and non-political leaders in the public sector and in relation to private sector, leaders "who devote their careers and lives to serving the State and the public".[186] This excluded people "famous in the public eye", like footballers, entertainers or singers but did cover "prominent figures in business, industry and professions" insofar as "the relevant outputs serve[d] to augment public welfare".[187] With respect to political leaders, any libel or slander suffered damages both personal reputation and "also the reputation of Singapore as a State whose leaders have acquired a worldwide reputation for honesty and integrity in office and dedication to the service of the people".[188]

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[178] *Ibid*. No reference was made to the government's view that governors were honourable men, or Confucian *junzi*, to develop a theory of reputation as honour, which frames a deferential society.

[179] [2010] 4 S.L.R. 357 (C.A.) [*Lim Eng Hock Peter*].

[180] *Ibid*. at para. 2.

[181] *Ibid*. at para. 10, referencing Patrick Milmo *et al.*, eds., *Gatley on Libel and Slander,* 11th ed. (United Kingdom: Sweet & Maxwell, 2008) at 268 [*Gatley on Libel and Slander*].

[182] *Ibid*. at para. 6, referencing *Gatley on Libel and Slander*, *ibid*.

[183] *Ibid*. at paras. 12, 29.

[184] *Ibid*. at para. 12.

[185] *Ibid*.

[186] *Ibid*.

[187] *Ibid*.

[188] *Ibid*.

Defaming political leaders was deemed a "serious matter in Singapore" as it damaged the "moral authority" needed to govern and lead the people.[189] In the way that a clerk's reputation for financial honesty or a solicitor's for integrity was "in a relevant sense, his whole life",[190] the court likened the reputation of Singapore public leaders to be their "whole life". This did not mean that public leaders could not be criticised at all; they could be strongly criticised for "incompetence, insensitivity, ignorance and any number of other human frailties" where such critique did not besmirch "their integrity, honesty, honour, and such other qualities that make up the reputation of a person".[191]

Due to the great weight accorded to reputational interests, the court described damages awarded to defamed public figures as "rather moderate", compared to damages awarded plaintiffs "of lesser public standing" in other Commonwealth jurisdictions.[192] For instance, to date, damages awarded to ministers in a single suit have not exceeded S$500,000;[193] MPs, whether opposition or government have not been awarded more than S$210,000.[194] In relation to professionals, damage awards have ranged from S$45,000 (architect) to S$150,000 (lawyers).[195] Comparatively, authors like Jeffrey Archer in the U.K. have been awarded £500,000 and MPs have received £150,000.[196]

Thus in Singapore, a differentiated regime for defamation damages exists. These may be classified thus, in order of position in the hierarchy:

Top Tier	Political leaders, where defamation causes injury to both personal reputation as well as the institutional reputation of government
Second Tier	Non-political public leaders who are public figures in business, industry and the professions where the relevant outputs serve to augment public welfare; higher damages accrue because of their higher social standing and devotion to public service
Third Tier	Prominent figures such as businessmen who are not national leaders or involved in public affairs, where the business does not serve the public welfare; nonetheless, professionals should get a higher award because of the damage done to their professional reputations
Fourth Tier	Private individuals

Reputation is thus tied to social standing and contribution to the public welfare, and the worth of one's reputation affects the quantum of damages awarded in defamation cases. The Singapore version of the 'public figure' or 'public leader' doctrine does not go towards enhancing the scope of free speech, but goes to a higher quantification of damages, to protect reputation.

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189 *Ibid*. at para. 13.
190 *Crampton v. Nugawela* (1996) 41 N.S.W.L.R. 176 at 193 (N.S.W.S.C.).
191 *Lim Eng Hock Peter*, *supra* note 179 at para. 13.
192 *Ibid*. at para. 14.
193 *Ibid*. at para. 15.
194 *Ibid*. at para. 16.
195 *Ibid*. at para. 17.
196 *Ibid*. at para. 19.

IV. Concluding Observations

In rejecting the American "clear and present danger test" in relation to the test for scandalising the court in *Shadrake Alan v. Attorney-General*,[197] Phang J.A. noted that only one minor Canadian court adopted a similar test.[198] He treated the North American test as an anti-model, stating:[199]

> [T]he right to freedom of speech in the US is *not*, with respect, *necessarily* an approach that *ought* to be emulated as it could… actually result in possible *abuse* and *consequent negation* of the right itself. This is no mere parochial rhetoric but is, rather, premised on logic and commonsense. Hence, it is no surprise, therefore, that jurisdictions across the Commonwealth (which are numerous as they are diverse and which, of course, include Singapore) adopt, instead, the approach from *balance*[.]

Indeed, recent developments in relation to the common law contempt of "scandalising the courts" have shown a positive shift away from treating concern for the reputation of courts as an overriding interest, towards seeking a genuine balance by appreciating that certain forms of critical speech merit protection.

This is reflected in two things: First, the shift away from the requirement that speech critical of the judiciary must have an "inherent tendency" to impair public confidence in the administration of justice,[200] to the more stringent test of requiring a "real risk" proposed by Loh J. in *Shadrake (No. 2)*[201] and approved by the Court of Appeal.[202] It may be recalled that an original rationale for this contempt, which had been abolished in England, was because of the gullibility of the coloured populations in its colonies.[203] This is inappropriate for a literate, highly educated first world nation. Insofar as the "real risk" test is more speech-protective, this is a good development in appreciating the democratic value of speech. Second, the recognition of a defence of "fair criticism", which protects speech made in good faith, a temperate manner and with argument and evidence, as discussed by Prakash J. in *Tan Liang Joo*.[204] Finding such speech valuable as it "allows for rational debate" which could enhance the administration of justice, as opposed to abusive vilification,[205] the court showed an appreciation that speech designed to serve truth and democratic debate over public interest matters. In addition, Prakash J. rejected a substantive limit on fair criticism, approved in *Shadrake (No. 1)* and *Shadrake (No. 2)*, which automatically deemed contemptuous speech which impugned judicial impartiality or imputed improper motives to judges.[206] She cautioned against judicial

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197 [2011] 3 S.L.R. 778 at paras. 17-19 (C.A.) [*Shadrake (No. 1)*].

198 *R. v. Kopyto* (1988) 47 D.L.R. (4th) 213; *ibid*. at para. 28.

199 *Shadrake (No. 1)*, *supra* note 197 at para. 41.

200 *Attorney General v. Wain* [1991] 1 S.L.R.(R.) 85 (H.C.), and more recently affirmed in *Attorney-General v. Hertzberg* [2009] 1 S.L.R.(R.) 1103 (H.C.) [*Hertzberg*].

201 *Supra* note 67.

202 *Shadrake (No. 1), supra* note 197.

203 *McCleod v. St. Aubyn* [1899] A.C. 549 (P.C.).

204 *Supra* note 140, see especially paras. 14-23.

205 *Ibid.*

206 *Ibid.* at para. 22. Loh J. agreed with this view in *Shadrake (No. 1)*, *supra* note 197 at para. 71, while Tay J. had taken the view that alleging judicial impartiality could never be fair criticism in *Hertzberg*, *supra* note 200 at para. 54.

over-sensitivity and assumptions of infallibility, noting the public interest in rooting out impropriety.

This is a welcome departure from past assumptions that may be seen to have over-valued public confidence in the judicial system and discounted the importance of critical speech and the argument that undue limitations of such speech would do little to foster confidence and accountability, but might in fact breed suspicion and distrust, if the courts were seen to find contempt too readily to protect their own reputation, *sans* judicial self-restraint.

These decisions demonstrate not only careful reasoning and a ready engagement with foreign decisions, but also a confidence in treading the path of developing an autochthonous public law jurisprudence, one "sensitive to the needs and mores of the society of which it is a part".[207] It would be over-simplistic to tar this as a mere apology for power or perpetuation of a statist 'rule of law' which consolidates rather than constrains state power; as new wine demands new wineskins, so a more nuanced lens is needed to evaluate the *communitarian* 'rule of law' practised in Singapore and its role in good government and governance. While the populist understanding of the 'rule of law' in Western societies is linked with liberalism, an apparently "neutral" state and a rights-based orientation, this does not have universal purchase as many societies reject a wholesale adoption of liberal values while seeking to practice an indigenised version of the 'rule of law', such as Singapore.

The 'rule of law' is not a panacea; it is a necessary but insufficient good. Its virtues are not realised in a 'rule by law' regime where law is used as an instrumental tool of government, possibly for repressive means or simply to provide a predictable environment for economic growth. Recourse must be had to substantive justice theories which can furnish a richer vocabulary of human dignity, fair dealing, equity, if the 'rule of law' is not to suffer the indignity of being a tool to undermine the common good, as in the case of the wicked Nazi legal system with its positivist view of law as the command of the unconstrained sovereign/*Führer*. Where value judgments are concerned, the plurality of societies will yield variations in matters such as the interpretation and scope of rights, duties, and goods. As Rajah J. (as he then was) observed in *Chee Siok Chin v. Minister for Home Affairs*:[208]

> Different countries have differing thresholds for what is perceived as acceptable public conduct; differing standards have also been established when it comes to the protection of public institutions and figures from abrasive or insulting conduct. There are no clearly established immutable universal standards. Standards set down in one country cannot be blindly or slavishly adopted and/or applied without a proper appreciation of the context in another. It is of no assistance or relevance to point to practices or precedents in any one particular country and to advocate that they must be invoked or applied by the court in another. The margins of appreciation for public conduct vary from country to country as do their respective cultural, historical and political evolutions as well as circumstances. Standards of public order and conduct do reflect differing and at times greatly varying value judgments as to what may be tolerable or acceptable in different and diverse societies[.]

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[207] *Tang Kin Hwa v. Traditional Chinese Medicine Practitioners Board* [2005] 4 S.L.R.(R.) 604 (H.C.) at para. 27.

[208] *Supra* note 79 at para. 132.

A global margin of appreciation will need to be discerned, to distinguish core from contested rights and standards, and legitimate and illegitimate degrees of variation in implementing freedoms such as that of expression. What must be avoided in negotiating the global and the local is both an apology for authoritarianism and unconscious cultural hegemony in the form of universalist prescriptions.

Even as an autochthonous legal system may be celebrated as an expression of self-determination, autochthony *per se* is not an unalloyed good; the values and the virtues which it espouses matter greatly, including its vision of the 'rule of law', as do the vices it fosters. In the larger scheme of things, the 'thin' proceduralist 'rule of law' is not an arrival, but part of the quest towards a constitutional order, which engages an anti-positivist orientation towards the interrelationship between law and justice/morality, shaping a polity's vision, conscience and identity. This quest is universal, even if we might end up at different destinations. The Singapore dialect has much to contribute to the global language of what the 'rule of law' is, what it requires, and what it is able and unable to accomplish in the enterprise of statecraft.