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WORD COUNT: 15, 065 (excluding footnotes)

# COMPARATIVE CONSTITUTIONAL LAW: ENTRENCHMENT, THE RULE OF LAW, AND THE SAFEGUARD OF RIGHTS

**LLM SEMINAR PAPER**

**LAWS 505: PUBLIC LAW – EXPLORING THE EDGE**

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**October 2004**

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# TABLE OF CONTENTS

**Abstract**

This paper examines the significance and necessity of entrenchment of a Bill of Rights in the safeguard of fundamental rights and liberties, through a comparative analysis of the constitutional legal framework of New Zealand vis-à-vis the Republic of Singapore.

The author suggests firstly, that entrenchment is but one of the few necessary components, which would produce, as its quotient, the safeguard of human rights. Further, because human rights are neither static nor absolute, therefore, there may be 'justifiable limitations' on those rights. It is the 'rule of law', which ensures that limitations upon said rights are 'justifiable' where the rule of law is taken to constitute both substantive fairness and procedural fairness. Substantive fairness determines the justiciability of the content of the law, whereas procedural fairness determines the justiciability of the promulgation of the law. Central to this thesis is the notion that substantive fairness is largely determined or undermined by socio-political culture, while procedural fairness is determined or undermined by the structure of government.

Subsequently, this paper seeks to show that in Singapore, in spite of its rigorous regime of procedural fairness, the political culture (e.g. government's 'Asian values' invocations, the 'chilling effect' etc) and dominant one-party government has bred a 'substantively *unfair*' human rights regime, particularly in the area of freedom of political expression. Furthermore, 'entrenchment' loses its significance when a two-thirds majority vote is easily attained.

Conversely, in New Zealand, the lack of entrenchment has not resulted in a (theoretically expected) pallid human rights regime *because of* the robust application of the 'interpretive function' of its Bill of Rights by the Judiciary; further, this undermines the fears enunciated in the White Paper (1985)[1] that the Judiciary, as unelected representatives, cannot be trusted to be the guardians of fundamental liberties. As such, this paper argues *for* entrenchment.

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[1] *A Bill of Rights for New Zealand: A White Paper,* A.6 *Appendices to the Journal of the House of Representatives,* Wellington, 1985

## *I FRAMEWORK*

### *A Introduction*

At its most basic level, a Bill of Rights is an acknowledgment of the intrinsic worth and dignity of the individual and a commitment towards the preservation of human rights against the untrammeled exercise of State power. While a Bill of Rights may exist alone as ordinary legislation, as in the case of the New Zealand Bill of Rights Act 1990 (hereinafter "BORA")[2], in most jurisdictions, including Singapore, the Bill of Rights is a statutorily incorporated component of a written, entrenched Constitution[3]. This paper focuses on the function of a Bill of Rights in the public sphere, where it serves to affirm and protect the autonomy of the individual against the State owing to the glaring imbalance of power between the two parties.[4]

The task of safeguarding rights is primarily achieved through ensuring that rights-inconsistent legislation are struck down, amended, or consistently interpreted with the Bill of Rights. Without entrenchment, a Bill of Rights can only serve as a substantive safeguard by "affirming rights", since laws passed in a procedurally correct manner, may nonetheless legally trump the rights contained within the Bill of Rights[5], regardless of its content. Therefore, entrenchment of a Bill of Rights is necessary to review or strike down rights-inconsistent legislation, providing in theory, a double-protection against arbitrary state incursions into individual or minority rights.

Procedural *or* substantive safeguards *individually* are inadequate to serve the purposes of rights-protection. This argument is derived from the acknowledgement that the rule of law consists of both formal ("thin") and substantive ("thick")

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[2] See section four of the New Zealand Bill of Rights Act 1990 (hereinafter "BORA")
[3] Constitution of the Republic of Singapore (1999 Rev Ed) (subsequently referred to as 'the Singapore Constitution' or 'the Constitution')
[4] However, the evolution of rights in recent times has seen the application of the Bill of Rights permeate into the private sphere in jurisdictions such as Israel, Germany, United States, United Kingdom and Canada. See Aharon Barak, "Constitutional Human Rights and Private Law" in Daniel Friedmann and Daphne Barak-Erez, Human Rights and Private Law (1 ed, Hart Publishing, Oxford, 2001) 13
[5] Section four BORA, above note 2

conceptions[6] and can also be seen as a contest, in this order, between the positive school of thought and the natural school of thought. Substantively, a Bill of Rights affirms the fundamental liberties; procedurally, a Bill of Rights is a legal weapon to strike down rights-inconsistent legislation. Similarly, it is the contest and polarization between these two conceptions, which has weakened the application of the rule of law.[7]

Singapore and New Zealand are well juxtaposed in this constitutional analysis – firstly, Singapore's Bill of Rights exist in an entrenched form, while BORA does not; secondly, while in theory Singapore's Bill of Rights should better protect rights than BORA, in application it does not. This paper explores the reasons to this effect.

Fundamentally, this paper argues that the best protection of individual rights and liberties is derived from accepting the need to fulfill both formal and the substantive conceptions of the rule of law. This paper further argues that in practice, entrenchment only serves as a formal procedural safeguard against state incursions into fundamental liberties. As elucidated by Sir Ivor Jennings[8]

> It is not enough to say with Dicey that 'Englishmen are ruled by the law, and by the law alone' or, in other words, that the powers of the Crown and its servants are derived from the law; for that is true even of the most despotic state

Substantive safeguards, which *affirm* rights and freedoms, can be found in the "spirit" of constitutional and legal instruments, otherwise known as legal principles, which as Dworkin suggests are "different from legal rules... and all around us"[9] Therefore, substantive safeguards are weakened when principles such as natural justice or due process are colored by socio-political invocations such as 'Asian values' and other values systems. This paper does not delve into the legitimacy or

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[6] Paul Craig, "Formal and Substantive conceptions of the Rule of Law: An Analytical Framework" (1997) Public Law, 467 – 487

[7] Thio Li-Ann, "Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore" (Fall 2002) 20 UCLA PAC. BASIN L.J. 1, 2

[8] Sir Ivor Jennings, *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 47

[9] Dworkin R, "Taking Rights Seriously: The Model of Rules I" (1967) University of Chicago Law Review, 14 – 45, 28

illegitimacy of such invocations, it merely asserts the existence of this phenomenon in the evolving constitutional framework. Conversely, entrenchment is a necessary procedural safeguard, which enables the Judiciary to serve as a check on the excesses of the other branches of government. Therefore, this paper argues that entrenchment of a Bill of Rights, while a desirable component of any constitutional framework, cannot be taken as a *sole* guarantor of rights.

### *B Outline*

The first part of this paper explores the nature of the *rule of law* and its formal and substantive implications. The argument postulated being that cultural relativism and political expedience greatly shape a society's understanding of the rule of law, thereby resulting in divergent conceptions. This part of the paper also explores the extent of that divergence.

The second part of this paper looks at the normative functions of Bill of Rights, and the implications of entrenchment in the safeguard of rights. Against this standard BORA and Part IV of the Singapore Constitution will be compared.

The third part of this paper looks at the adequacy existing substantive and procedural safeguards for fundamental rights and freedoms in New Zealand and Singapore. And further considers the strength of alternative safeguards in New Zealand, apart from the entrenchment of BORA.

The fourth part of this paper provides a comparative analysis of the protection afforded freedom of expression in Singapore and New Zealand as a case study.

## *II Fleshing out the Rule of Law*

### *A Substance, Form and Realism*

The rule of law is an ambiguous concept[10], and further, one, which has been mauled to pieces in constitutional discourse to serve political expedience[11] Nonetheless fundamentally, its meaning can be taken literally – it is the rule *of law* and not the rule *through* law[12], nor the rule by *men*[13]; intrinsically, it is the absence of arbitrary power.

It has been asserted that the primary meaning of the rule of law is that everything must be done according to law, while its secondary meaning is that government should be conducted within a framework of recognized rules and principles, which restrict discretionary power.[14] However, it is important to note that such a conception of the rule of law is incomplete; it is merely a formal conception – that is, one, which is concerned with the promulgation of law and the organization of public power[15].

Where a formal reading is taken, the result is that the rule of law potentially allows the state to validate itself – laws are passed to legitimize state actions. Although Raz emphasizes, *inter alia*[16], that 'all laws should be prospective, open and clear', nonetheless so long as the legislative procedure is complied with, the law is valid, *notwithstanding its content.*

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[10] Joseph PA, *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2001) 196

[11] Michael C Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (Spring 1998) 11 Harv. Hum. Rts. J. 109, 134

[12] See Kanishka Jayasuriya, "The Rule of Law and Capitalism in East Asia" (1996)The Pacific Review Vol. 9, No. 3, 367 – 388

[13] See Raz Joseph, "The Rule of Law and Its Virtue" (1977) 93 LQR 195; for "Rule *under the* law" see Goodhart AL, "The rule of law and absolute sovereignty" (1958) 106 Univ Pennsylvania L Rev 943

[14]Wade ECS and Bradley AW, Constitutional and Administrative Law (10 ed, Longman, London, 1985) chap. 6; Dicey AV, *An Introduction to the Study of the Law of the Constitution*, ed E.C.S. Wade (10 ed, Macmillan, London, 1959), chap 4; Ivor Jennings, *The Law and the Constitution*, see above note 8

[15] See Joseph PA, *Constitutional and Administrative Law in New Zealand*, above note 10

[16] "(1) All laws should be prospective, open and clear... (2) Laws should be relatively stable... (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules", Raz Joseph, "The Rule of Law and Its Virtue", above note 13

Conversely, the substantive conception of the rule of law is concerned with the content of the law, which is greatly influenced by "non-legal" elements such as socio-political culture, values systems and historical heritage.[17] De Smith provides a complete definition of the rule of law thus[18]

> (a) The powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and
>
> (b) The law should conform to minimum standards of justice, both substantive and procedural

Current legal thinkers such as Paul Craig argue that it is the substantive conception of the rule of law, which should preside, particularly in the field of public law. Firstly, Craig argues that the implications for public law doctrine are more "open" than is commonly imagined. Therefore, it is wrong to conclude that the formal rule of law only enables the courts to apply formal constraints on governmental power, or that it excludes all reference to moral considerations.[19] Secondly, Craig argues that 'pure formalism' is a myth[20] and that any depiction of administrative law[21] framed in terms of democracy, the separation of powers and the basis for judicial review is manifestly substantive, whether one agrees with it or not.[22]

However, in a realistic view of law, the machine does *not* run by itself. There are, no less than in Austin's time, people in positions of power pulling its levers. The substantive conception of the rule of law suggests that law *is* intractably politics. On the other hand, theorists such as Hart and Kelsen strenuously advocate a de-politicised conception of law and implicitly suggest that law can have a unity, system and

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[17] "Many of the principles, which can be derived from the basic idea of the Rule of Law, depend for their validity or importance on the particular circumstances of different societies" Raz, "The Rule of Law and its Virtue", above, note 13

[18] Smith SA and Brazier R, *Constitutional and Administrative Law* (8 ed, Penguin Books, London, 1998) 17

[19] Craig P, *Constitutional Foundations, the Rule of Law and Supremacy,* (2003) Public Law, 104

[20] "The conceptual label of formalism is unwarranted in its own terms. This is especially important given that such labels are intentionally pejorative, and can mean all manner of things", Stone M, "Formalism", in Coleman and Shapiro, eds, *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press, 2002) Chap. 5

[21] "There is no distinction between constitutional and administrative law rights that form part of the rule of law and those, which do not." Craig P, *Constitutional Foundations, the Rule of Law and Supremacy,* above note 19, 103

[22] Craig, *Constitutional Foundations, the Rule of Law and Supremacy,* above note 19, 105

integrity independent of politics, consequently, that the idea of the rule of law is in some sense, built into the very notion of law.[23] For Kelsen, a major reason for his refusal to accept the state as an entity above law is because, when it is recognized as such, appalling things can be done in its name[24]

> Whereas the individual as such is in no way thought entitled to coerce others, to dominate or even kill them, it is nevertheless his supreme right to do all this in the name of God, the nation or the state, which for that very reason he loves, and lovingly identifies with, as "his" God, "his" nation and "his" state

Similarly, positivist Joseph Raz cautions against over-theorizing and exaggerating the value of the rule of law, as "it is merely one of the political ideals or virtues, which a legal system may lack of possess to a greater or lesser degree."[25] However, Raz's conception of the rule of law is essentially a formal one – Law should be prospective, open, stable and clear[26] or in a nutshell, "capable of providing effective guidance"[27]. Raz's conception of the rule of law as being independent of morals and values system has led him to concede that

> A non-democratic legal system... may in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better off than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.

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[23]Cotterrell Roger LLD, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (1 ed, Butterworths, London and Edinburgh, 1989) 113

[24] Kelsen, H. "God and the State", P. Heath, in O. Weinberger (ed) Hans Kelsen – Essays in Legal and Moral Philosophy (Dordrecht, D. Reidel, 1973) 67; Also, "A non-democratic legal system... may in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better off than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law." Raz, 'The Rule of Law and Its Virtue', above note 13, 196

[25] "It is also to be insisted that the rule of law is just one of the virtues, which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), and human rights of any kind or respect for persons or for the dignity of man", Raz, 'The Rule of Law and Its Virtue', above note 13, 196

[26] Also "Principles of natural justice must be observed. The courts should have review powers over the implementation of the other principles. The courts should be easily accessible. The discretion of the crime-preventing agencies should not be allowed to pervert the law" Raz, 'The Rule of Law and Its Virtue', above note 13, 215; See also Fuller Lon, "Positivism And Fidelity To Law: A Reply To Professor Hart" (1958) 71 Harv L Rev 630, 660

[27] Raz, 'The Rule of Law and Its Virtue' above note 13, 215

Therefore, this author asserts that the acknowledgment and acceptance of both the substantive and formal conceptions of the rule of law is *integral* in the pursuit of the rights-protection in a democratic legal system. At the same time, efforts to comply with both the substantive and formal conceptions of the rule of law should be balanced. An overemphasis on substantive compliance could lead to bigotry and paternalism, where Parliament or the Judiciary dictates what is morally virtuous for society, which undermines democracy. Similarly, history has shown that an overemphasis on procedural compliance can prove disastrous, as evidenced by the 'legal' brutality of the Fascist government in the era of Nazi Germany.[28]

## *B Influences on the Conception of the Rule of Law*

This part of the paper looks at some of the historical and political influences that have shaped the conception of the rule of law in Singapore and New Zealand; the objective being to ascertain if either Singapore or New Zealand ascribe to a desirably "balanced" conception of the rule of law.

### *1. Significance of Westminster Heritage*

The constitutional framework of both New Zealand[29] and Singapore[30] are founded on the British Westminster model.[31] Both jurisdictions apply the laws of

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[28] Mauro Cappelletti, *Judicial Review in the Contemporary World*, (1 ed, Bobbs-Merrill, Indianapolis, 1971) 118

[29] McDowell W and Webb D, *The New Zealand Legal System: Structures, Processes & Legal Theory* (2 ed, Butterworths, Wellington, 1998) 111

[30] *Ong Ah Chuan v PP* [1980] 1 MLJ 64, 865, per Lord Diplock describing Singapore's Constitution as one "founded on the Westminster model"

[31] "In its narrower sense, the main features of the Westminster model are – firstly, it is a constitutional system in which the head of state is not the effective head of government; secondly, in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; thirdly, in which the effective executive branch of government is Parliamentary inasmuch as Ministers must be members of the legislature; and thirdly, in which Ministers are collectively and individually responsible to a freely elected and representative legislature." See Smith SA "Westminster's Export Models: The Legal Framework of Responsible Government" (1961 – 63) 1 Journal of Commonwealth and Political Studies, 2 – 16; Roberts-Wray Kenneth, Commonwealth and Colonial Law (Stevens and Sons, London, 1966) 289

England in common law[32], and only recently abolished appeals to the Privy Council[33]. Both New Zealand and Singapore can be viewed as autochthonous[34] transplants of the English system, whether self-seeded without legal antecedent, or constitutionally transposed in accordance with the legal system's rule of recognition and the succession of rules.

For Singapore, since 9 August 1965, Singapore has been a sovereign republic with a Westminster-modeled parliamentary system of government. The organs of state (the executive[35], the legislature[36] and the judiciary[37]) are provided for in a written constitution. The Head of State is the President[38], although elected by popular mandate, exercises essentially custodial powers and ceremonial duties.

For New Zealand, the Constitution Act of 1986, which revoked the application of the 1852 Act symbolically separated the legal and historical roots of the New Zealand constitution, by transferring legislative powers from the General Assembly to the Parliament of New Zealand.[39]

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[32] See *R v Symonds* (1847) NZPCC 387 and Imperial Laws Application Act 1988; The inheritance of English laws and the actions of the British authorities in 1839 – 1840 suggest occupation and settlement as the legal basis for the Crown's claim to territorial sovereignty; See Joseph PA, *Constitutional and Administrative Law in New Zealand*, above, note 10, 17 – 31; Also "'*law*" includes written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore", s 2(1) Constitution of the Republic of Singapore, and s 162 Constitution of the Republic of Singapore

[33] The constitutionality of the legislation abolishing appeals to Privy Council was challenged at the High Court in Singapore, see *Teo Soh Lung v Minister for Home Affairs & Ors* [1989] 2 MLJ 449; See Judicial Committee (Repeal) Act 1994 (No 2 of 1994), which received Presidential assent on 16 Mar 1994. In 1989, appeals to the Privy Council had already been significantly curtailed with the passage of the Judicial Committee (Amendment) Act (No 21 of 1989), s 2, which amended s 3 of the Judicial Committee Act so as to limit appeals in civil matters to cases in which the parties to the proceeding have at any time before the hearing of the case by the appellate court consented in writing to be bound by an appeal to the Judicial Committee in that case and in criminal matters to cases where the offence was punishable with death or imprisonment for life and the decision of the appellate court was not unanimous.

[34] From the Greek word meaning 'sprung from that land itself'

[35] Part V, Chapter 2 of the Constitution of the Republic of Singapore 1999

[36] Part VI of the Constitution of the Republic of Singapore 1999

[37] Part VIII of the Constitution of the Republic of Singapore 1999

[38] Part V, Chapter 1 of the Constitution of the Republic of Singapore 1999

[39] "We do not look to our Westminster heritage for constitutional legitimacy and national sovereignty. While New Zealanders embrace their colonial past, 'a people's sense of nationhood is self-fulfilling." Joseph PA, "The Legal History and Framework of the Constitution" in Colin James ed, *Building the Constitution,* see above note 39, 171

Both New Zealand and Singapore have strong Parliamentary institutions, despite the fact that both are single-chamber Parliaments. New Zealand has a quintessential Westminster Parliament, predicated on the notion of 'Parliamentary sovereignty', which has for many years (prior to the introduction of MMP) produced a single-party government with a relatively stable party system.[40] While Singapore, has characteristically a dominant one-party Parliament.[41] From 1968 to 1981, the People's Action Party (PAP) was the only elected party in Parliament. Even then, the PAP had more than a two-thirds majority in Parliament. This allowed the PAP government to make fundamental and swift changes to Singapore society through the legal system.[42]

The significance of the Westminster inheritance[43], in relation to the issue of entrenchment, is the imported doctrine of Parliamentary sovereignty and the rule of law.

(a) Parliamentary Sovereignty

It has been observed that the doctrine of Parliamentary sovereignty[44] finds its validation in positive legal thought. Fundamentally, it is a legal system wherein the

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[40] "New Zealand has long been accorded something of a special status among the worlds democracies as one of the purest examples of the Westminster model of government, a model of virtually unrestrained executive authority with an electoral system which in some ways was more British than Britain", Roberts Nigel, *International Institute for Democracy and Electoral Assistance*, "New Zealand: A Long-Established Westminster Democracy Switches to PR" http://www.idea.int/esd/case/new_zealand.cfm <last accessed 24 Sep.04>

[41] See generally Chan Heng Chee, The Dynamics of One Party Dominance: The PAP at the Grass-roots, (Singapore University Press, Singapore, 1978)

[42] See Tan Eugene Kheng-Boon, "Law and Values in Governance: The Singapore Way" (2000) 30 HKLJ 91, 93

[43] Also, both jurisdictions function as unitary (rather than federal) states, comprising of the three institutions – the legislature, the executive and the Judiciary – that function on the legal doctrine of 'separation of powers'. However, unlike the British system, both New Zealand and Singapore are unicameral Parliamentary systems, with only a single chamber.

[44] For a classical treatment of the subject, see Dicey AV, Part I "The Sovereignty of Parliament" in *An Introduction to the Study of the Law of the Constitution*, ed E.C.S. Wade (10 ed, Macmillan, London, 1959), chap 4; For a modern analysis of the doctrine, see Bradley AW, "The Sovereignty of Parliament – in Perpetuity?" in Jowell, J.L. & Oliver D, The Changing Constitution. (4 ed, Oxford University Press, London, 2000)

Judiciary recognizes Parliamentary enactment as the highest source of law.[45] As affirmed in English and New Zealand common law[46]

> What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law known to this country

The law is what it is, not what it ought to be; and the interpretive function of the Judiciary is belittled in such a legal system. As such, the doctrine of Parliamentary supremacy is in direct contravention with the doctrine of constitutional supremacy, which features an entrenched Bill of Rights as 'higher law' as will be discussed later

Parliamentary sovereignty, upon which the Westminster system is premised, dictates that Parliament must always be free to legislate for the public good. Therefore, entrenchment, which would purposely make it more difficult for a future Parliament to undo its legislation[47], contravenes the doctrine of Parliamentary sovereignty.[48]

Parliamentary sovereignty, as conceived by Dicey, presupposes that sovereignty implies illimitability.[49] This doctrine has come under heavy criticism – foremost, the rule of law requires that it is the *law,* which regulates all institutions of government, not the rule of *men.*

Arguments asserting that the rule of law justifies legislative supremacy over judicial supremacy are often arguments in favor of the positivist conception of the

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[45] See generally, Joseph PA, *Constitutional and Administrative Law in New Zealand*, above note 10, 461 – 509

[46] *Cheney v Conn* [1968] 1 All ER 779, 782 per Ungoed-Thoms J, affirmed in *Haliburton v Broadcasting Commission* 3/12/98, Morris J, HC Auckland CP 342/98, 8

[47] However s. 268 Electoral Act 1993 protects s 60, 74, 168 from legislative amendment or repeal in the ordinary way.

[48] "Acts against the power of the Parliament, quod subsequent bind not... for it is a maxim in the law of the Parliament, quod leges posteriors priores contrarias abrogant", Coke E, *Fourth Part of the Institutes of the Laws of England* (London, Brooke, 1797) 42 – 43; Joseph PA, *Constitutional and Administrative Law in New Zealand*, above, note 10, 530 – 531

[49] "Every attempt to tie the hands of [a sovereign legislature] breaks down, on the logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which, if valid, would make it cease to be absolute" Dicey, *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan & Co, London, 1965) 68

rule of law[50]; thus, such arguments miss the mark by blatantly ignoring the virtues of the *substantive* conception of the rule of law. Dicey himself conceded that, "if the doctrine of parliamentary sovereignty involves the attribution of unrestricted power to parliament, the dogma is no better than a legal fiction"[51]

The lack of entrenchment of a Bill of Rights means the Courts cannot strike down an Act of Parliament as being unconstitutional. The Act does not limit or control the sovereignty of Parliament. If a statute cannot be given a statutory construction that is consistent with the Act, then the Court is obliged to apply the particular statute.[52] BORA is to be given a fair, large and liberal interpretation.[53] The Court cannot give statutes strained meanings in order to make their meaning consistent with the Act.[54]

Ultimately, there is no institution higher than Parliament to serve as a check on Parliament.[55] The New Zealand Parliament enjoys all the attributes of a sovereign legislature. There are no limits on legislative power in a unitary state that has no federal divisions, no entrenched laws, and no constitutional Bill of Rights.[56] The validity of an Act of Parliament cannot be challenged or called into question in a Court of law.[57] Parliamentary enactments prevail over judicial precedent and common

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[50]Ekins Richard, "Judicial Supremacy and the Rule of Law" (2003) LQR 119 (JAN) 147 – 152

[51] AV Dicey, *Introduction to the Study of the Law of the Constitution,* see above note 49, 71

[52] See *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) In that case, Cooke P stated that the basic rule never to be lost sight of when applying BORA is that, although the Court must strive to construe the legislation in a manner that is consistent with the Act, if that is not possible then the inconsistent provision prevails.

[53] See *Ministry of Transport v Noort,* above note 52, although the Acts Interpretation Act 1924, s 5(j) (as quoted) has been repealed and replaced by the Interpretation Act 1999, s 5, which provides that enactments must be interpreted in light of their purpose.

[54] *Ministry of Transport v Noort,* above note 52, 272 (CA) per Cooke P

[55] "This is a mythical and false assumption in the context of the modern day pluralist society. Not only does the parliamentary executive control Parliament through the vehicle of the party system, the mandate wielded by the parliamentary majority is at best imperfect and temporal. Judicial review leaps into the fray as an important countermajoritarian check. It is the method by which fundamental constitutional values 'trump' the short term values embodied in legislation. Historically, judicial review arose as a response to the post-Holocaust fear that laws as evil as those contained in Nazi edicts might be promulgated without check by the legislature." Thio Li-Ann, "Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?" (1997) SJLS 257

[56] See *Ex parte Selwyn* [1872] 36 JP 54, where Cockburn CJ and Blackburn J said of such a state that "[t]here is no judicial body in the country by which the validity of an Act of Parliament can be questioned. An Act of the legislature is superior in authority of any Court of law… and no Court could pronounce judgment as to the validity of an Act of Parliament"

[57] "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the higheset form of law known to this country" *Cheney v Conn (Inspector of Taxes)* [1981] 1 WLR 242, 247; [1981] 1 All ER 779, 782 per Ungoed-Thomas J. See also *Quilter v Attorney-*

law principles[58], subordinate legislation made under Parliament's delegated authority[59], prerogative instruments issued under the Crown's constituent power[60], international treaties entered into or ratified by the government[61], and constitution conventions.[62] Therefore, unless a hypothetically corrupt Parliament is willing to commit "suicide" or abdicate[63] as Dicey suggested, Parliamentary sovereignty is really[64]

> An expression of faith in the effectiveness of political checks and the self-correcting nature of democracy with the will of the parliamentary majority being concordant with the will of the popular majority

Therefore, by embracing the doctrine of Parliamentary sovereignty, New Zealand has also embraced Diceyan positivism, which eschews any criterion of legal validity and leaves little place for critical thinking about the law-making process.[65]

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*General* [1998] 1 NALR 513 (CA) and *R v Pora* [2001] 2 NZLR 37, 50 – 51 and 65 where Elias CJ and Tipping J (in a joint judgment) and Thomas J observed that Parliament can abrogate fundamental rights, provided it uses express language. The Courts presume against Parliament intending to effect this result in the absence of express or emphatic words.

[58] Parliament can reverse judicial decisions with retrospective effect, although to deprive litigants of the fruits of victory is a usurpation of judicial power in breach of constitutional convention. Compare the Cultha Development (Clyde Dam) Empowering Act 1982 enactment before the Muldoon Government was declined a water right for the Clyde high dam, following proceedings before the High Court and the former Planning Tribunal. Compare also the War Damages Act 1965 (UK), which retrospectively negated the decision of the House of Lords in *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75.

[59] Parliament may, through use of the "Henry VIII clause", accord primacy to delegated legislation over other designated statutes of Parliament. The use of these clauses has been criticized for reposing undue power in the executive: see *Report of the Committee on Ministers' Powers* (Cmd 5060, 1932) 36 – 38 and 59 – 60 ("the Donoughmore Report")

[60] See for example, Constitution Act 1986, s 6 (1) qualifying the Governor-General's power of appointment of ministers delegated under cl X of the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225)

[61] International treaties are not enforceable in the municipal Courts unless incorporated by legislation into domestic law. *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); See also *Saloman v Customs and Excise Commissioners* [1967] 2 QB 116, 143; [1966] 3 All ER 871, 875 (CA) per Diplock LJ ("the sovereign power of the Queen in Parliament extends to breaking treaties"). The Courts nonetheless presume that Parliament does not intend to legislate in violation of New Zealand's international treaty obligations, and will construe ambiguous legislation accordingly.

[62] See *Madzimbamuto v Larnder-Burke* [1969] 1 AC 645, 723 (CA) Lord Reid observed of the convention that the United Kingdom would not legislate for Southern Rhodesia without its request and consent: "That was a very important convention but it had no legal effect in limiting the legal power of Parliament"

[63] AV Dicey, *Introduction to the Study of the Law of the Constitution*, see above note 49, 68 – 69

[64] Thio Li-Ann, "Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?", above note 55, 256

[65] Joseph PA, *Constitutional and Administrative Law in New Zealand*, above, note 10, 464, 480; Also, Joseph points out that the Diceyan conception of illimitable Parliament is a paradox; if "Parliament is not bound by its predecessors", then Parliament is disabled from enacting unchangeable legislation and not sovereign, as such, Dicey's doctrine is paradoxical.

However, it is noteworthy that in New Zealand, under the recently adopted "Proportional system" or MMP (1996) of Parliamentary elections[66], the convention of ministerial responsibility requires that the government resign if defeated on a vote of confidence.[67] Further, the demands in the 1980s for means to restrain governments by referendum have abated since MMP[68], which is a positive indication of its ability to better represent *all* sectors of society. Nonetheless, this should not be wrested as an argument against entrenching BORA, since the objective of entrenchment is to create a procedural safeguard against rights-inconsistent legislation. Having revealed the fallacy in the Diceyan conception of "illimitable government", it is again submitted that entrenchment is both a necessary and an absent feature of BORA.

(b) The "rule of law" in Singapore

As observed by the International Human Rights Committee of the New York City Bar Association, in Singapore, "*despite the trappings, the Rule of Law in Singapore today has given way to empty legalism*"[69] Although harsh-sounding, there is *some* truth in this observation as this part of the paper will show.

Firstly, the Courts in Singapore have eschewed a broad, purposive approach to the rule of law, for a niggardly, formalistic conception. The Privy Council[70] in *Ong Ah Chuan*[71], hearing an appeal from Singapore, asserted that the word *'law'* in any Westminster based Constitution, particularly in fundamental liberties chapters, must

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[66] See, generally, International Institute for Democracy and Electoral Assistance, Nigel Roberts, *New Zealand Case Study,* http://www.idea.int/esd/case/new_zealand.cfm <last accessed 24 Sep. 04>

[67] Appropriation or Imprest Supply bills are automatically treated as matters of confidence: see McGee DG, *Parliamentary Practice in New Zealand* (GP Publications, Wellington, 1994) 72. Compare the circumstances surrounding the Hon Jenny Shipley's leadership of a minority government from August 1998 until the 1999 elections: see A Stockely "Constitutional Law" (1999) NZLR 173

[68] Colin James, "The Political History and Framework since 1980", in *Building the Constitution,* above note 39, 166

[69] Beatric S. Frank et al., "The Decline of the Rule of Law in Malaysia and Singapore Part II – Singapore, Report of the Committee on International Human Rights of the Association of the Bar of the City of New York", (1991) 46 The Record 7, 17; See, generally, http://www.singapore-window.org/rights.htm <last accesed 13 Sep 04>

[70] Appeals to the Privy Council were abolished in 1989, see *Teo Soh Lung v Minister for Home Affairs & Ors*, above note 33

[71] *Ong Ah Chuan v PP* [1981] 1 MLJ 64 (Privy Council); see too *Hwa Tua Tau v Public Prosecutor & Associated Appeals* [1981] 2 MLJ (Privy Council) per Lord Diplock

refer to a system of law, which incorporates the fundamental rules of natural justice.[72] As such, the Lord Diplock emphasized[73]

> It would have been taken for granted by makers of the Constitution that the word 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout these fundamental rules. If it were otherwise, it would be a misuse of language to speak of law as something, which affords 'protection' for the individual in the enjoyment of his fundamental liberties and the purported entrenchment of articles 9(1) and 12(1) would be little more than a mockery.

However, this expansive approach according protection to human rights has been replaced by a narrower, or one could generously term, 'positivistic' approach as evidenced in recent cases.[74] This approach advocates that so long as the procedure of legislation or constitutional amendments is complied with, the law is valid, notwithstanding its content. Common law development of rights-protections in Singapore has been consistently blocked by legislative over-ruling.[75] In such a political climate, the supremacy of the Constitution is called to question.

Secondly, legal doctrine tells us that the Singapore courts will not look to constitutional cases from other jurisdictions. Singapore courts often cite *State of Kelantan v Government of the Federation of Malaya*[76] in support of the four walls doctrine, the notion that the

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

A closer look at the jurisprudence suggests, however, that the use of foreign constitutional cases is very much the norm in Singapore; the Supreme Court (which

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[72] See *Ong Ah Chuan v PP*, above note 71, 865 *per* Lord Diplock
[73] *Ong Ah Chuan v PP*, above note 71, 865 *per* Lord Diplock
[74] *Teo Soh Lung v Minister for Home Affairs & Ors,* above note 33, *per* Chua J, "In my judgment Parliament has the power to amend any provision of the Constitution so long as the special procedure required (i.e. two-thirds majority) for the amendment is followed."
[75] See Thio Li-ann, "An "i" for an "I"? Singapore's Communitarian Model of Constitutional Adjudication" (1997) 27 HKLJ 152
[76] *Kelantan v Government of the Federation of Malaya* [1963] MLJ 355, 358

comprise the Court of Appeal and the High Court) often does look beyond the four walls of the Constitution in its constitutional jurisprudence, but only where it is to the interest of "national security" or "public order".[77]

Thirdly, in place of its Westminster heritage and Diceyan positivism, the "spirit" of the Singapore Constitution is characterized by a curious hybrid of 'Asian values' and 'relative democracy', which critics have come to label 'Statist Legalism'[78]

> This entails a form of legal ideology, which is different from that, which is dominant in Western Europe. Legalism becomes akin to a kind of formalism in the sense of being an *instrument*, a means of achieving specific ends. Legal formalism – rather than legal positivism – with its emphasis on the application of formal procedures, rules and processes is the appropriate ideology for this Statist legalism."

An example of the so-called "communitarian approach" in practice can be seen in the application of the White Paper on Maintenance of Religious Harmony.[79] Contextually, Singapore is a multi-cultural society, where the dominant racial groups are Chinese, Malay and Indian. The drafters of the Constitution[80] were desirous of ensuring there ought to be "no room for any division of citizens or of peoples living in a free and democratic nation into citizens or peoples of different races, languages and creeds", particularly as "the Chinese constitute the majority among the multi-racial peoples in the Republic"[81] Therefore, section 18 of the Maintenance of Religious Harmony Act (MRHA) was drafted to pre-emptively quell civil unrest.[82]

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[77] See Thio Li-ann, "An "i" for an "I"? above note 75, 172 – 74; See Ramraj V, "Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia" 6 Sing J Int'l & Comp. L. 302, "The real dispute is not over the use of foreign cases per se, but the use that is made of them."

[78] Kanishka Jayasuriya, The rule of law and capitalism in East Asia, above note 32, 371

[79] White Paper on Maintenance of Religious Harmony Cmnd 21 of 1989; See Report of the Select Committee on the Maintenance of the Religious Harmony Bill (Bill No 14/90), Parl 7 of 1990, presented to Parliament on 29 October 1990; See also Winslow, "The Separation of Religion and Politics: Maintenance of Religious Harmony Act 1990" (1990) 32 Mal LR 327

[80] See Report of the Constitutional Commission 1966, Tan, Yeo and Lee, *Constitutional Law in Malaysia and Singapore* (2 ed, Butterworths, Asia, 1997) 1020

[81] See Report of the Constitutional Commission 1966, para 23; Singapore was embroiled in racial riots in 1963 leading to its separation from Malaysia. See generally, Chan Heng Chee, *The Dynamics of One Party Dominance: The PAP at the Grass Roots*, above note 41; see, generally, Drysdale John, *Singapore: Struggle for Success,* (Times Publishing Bhd, Singapore, 1984)

[82] "This Bill is a recognition of a retrogression or potential deterioration in religious harmony... We introduce it more in sorrow than with joy. It is to prevent us from sliding backward. It is an act aimed at preserving common sense and harmony" (Singapore Parliamentary Debates, 23 February 1990 at cols. 1147 – 1159)

Taking a closer look however, it is observed that in practice, the MRHA is also applied to prohibit acts that *indirectly* cause disharmony, when religion and politics are mixed. [83] It does so by issuing restraining orders of up to two years (subject to renewal), at the discretion of the Presidential Council, whose decisions are *precluded* from judicial review under section 18 MRHA. To any layman, such a powerful discretion couched under such a 'communitarian' objective ought to raise suspicions, particularly where politics is at issue[84].

## 2. *Singapore's "Asian Roots"*

Singapore largely eschews its Westminster heritage[85] under the cloak of cultural relativism and 'Asian values'[86]. The Asian values ideology has three distinct leitmotifs. [87] Firstly, there is the argument that the liberal West is permeated by the ethos of individualism and a 'rights culture' which is contrasted with the

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[83] Maintenance of Religious Harmony Act (Cap 167A) (hereinafter "MRHA") s 8(1)(b) – (d)

[84] In 1987 the government detained a group of 22 Roman Catholic social activists, (all of whom were students at the National University of Singapore), *without trial,* accusing them of using church organizations as cover for a Marxist plot. See http://countrystudies.us/singapore/24.htm <last accessed 17 Sep. 04> "After releasing 21 of the 22 by the end of 1987, subject to restrictions on their freedom of movement and association, the Singapore authorities rearrested eight in April 1988 after they had signed a public statement denying the accusations against them and describing their mistreatment in detention. The government also arrested two lawyers who had defended the detainees, as well as another former detainee who had not signed the April statement but was accused of helping to draft and distribute it." http://www.hrw.org/reports/1989/WR89/Singapor.htm <last accessed 1 Oct. 04>; For events surrounding the detainment, See generally, http://www.singapore-window.org/sw01/010521m1.htm <last accessed 1 Oct. 04>

[85] "The basic difference in our approach springs from our traditional Asian value system, which places the interests of the community over and above that of the individual. In English doctrine, the rights of the individual must be the paramount consideration; we shook ourselves free from the confines of English norms, which did not accord with the customs and values of Singapore society." Address by then Prime Minister Lee Kuan Yew at the Opening of the Singapore Academy of Law, (1990) 2 Singapore Academy of Law Journal 155.

[86] See, generally, Bauer JB and Daniel A Bell (eds), The East Asian Challenge for Human Rights (Cambridge University Press, Cambridge, 1999); Theodore Wm de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Harvard University Press, 1998); Mauzy Diane, "The Human Rights and "Asian Values" Debate in Southeast Asia: Trying to Clarify the Key Issues" (1997) The Pacific Review 210; and Kwong YC, "Leninism, Asian Culture and Singapore" (1999) 27 Asian Profile 217; In 1988, Singapore's then First Deputy Prime Minister, Goh Chok Tong, proposed a radical new plan which was taken up and addressed in 1989 by the then President Wee Kim Wee who stated: "in less than a generation, attitudes and outlooks of Singaporeans, especially younger Singaporeans, have shifted. Traditional Asian ideas of morality, duty and society which have sustained and guided us in the past are giving way to a more Westernised, individualistic and self-centred outlook on life." Singapore Ministry of Information, Communications and the Arts (MITA), Our Shared Values

[87] Kanishka Jayasuriya, 'Understanding 'Asian values' as a Form of Reactionary Modernization', (1998) *Contemporary Politicis,* Vol. 4, Number 1, 77

*communitarian* ethos of the East where familial duties and community obligation play a central role in social life.[88] Secondly, the virtue of discipline is enshrined – in politics, in the family, and in the workplace. Thirdly, reinforcing the principle of duty and discipline is an organic notion of state and society, which is intimately associated with the common 'good' of economic development.

These three leitmotifs, either individually, or in combination, have provided a powerful normative framework through which state power can be justified and exercised; and more importantly, they allow the constitution of a sense of legitimate social purpose to be pursued by the exercise of state power. [89]

Furthermore, enshrined in the Shared Values White Paper[90], are *inter alia,* paternalistic and utilitarian principles such as "consensus, not contention" and "community before self", purportedly derived from Confucianism, and of direct relevance to our 'Asian' society. The tactical refrain of 'Asian values' has been

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[88] "In the East, the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms. This can only exist in an ordered state and not in a natural state of contention and anarchy" Zakaria, F "Culture is Destiny: a Conversation with Lee Kuan Yew", (1994) *Foreign Affairs* No. 2, 112

[89] Kanishka Jayasuriya, "Understanding 'Asian values' as a Form of Reactionary Modernization", above note 87, 78

[90] Shared Values White Paper, 1991, cmd. 1, para. 41(Sing.) A paper without legal effect but which may be taken as the government's preferred ideology. For a critical reading, see Balakrishnan N, "Values Offer Shares in Confucian Society: Esprit de Core" (Feb. 7 1991) 151 (6) Far E. Econ. Rev., Feb. 27. In 1988, Goh Chok Tong said in Parliament: "Singaporeans expect the Prime Minister, and indeed any minister, any MP, to be a superior man, a man of ability and integrity who can set things right and ensure good government. He must be a junzi, a Confucian gentleman." What Qualities Would You Want in Political Leaders? (Nov. 28 1992) Straits Times (Sing), 33

criticized for being a mechanism of political expedience[91], canvassed under the banner of cultural relativism[92]

> Unless a nation is geographically, historically, culturally, and linguistically separated from other nations... no system of values, principles, and conventions may be regarded as "nationalistic" in the narrow and jingoistic sense of the word

The critique stems from the argument that there is no single culture within a state and thus the state cannot espouse a fully representative concept of culture. Furthermore, "culture" is a dynamic concept, prone to both endogenous and exogenous change.[93]

With specific regards to Confucianism, academics have observed that the Confucian nature, which is feudal, hierarchical and authoritarian, is in blunt conflict with the rule of law rather than with human rights values.[94] Firstly, the theory of separation of powers is not a concept to be found in the Chinese feudal dynasties, which ostentatiously embraced the rule of men.[95] During the two thousand year feudal period, the judicial function was an essential power of Chinese executive

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[91] Singapore is a curious hybrid of Confucianism, Westminster autochthony and "Asian values". In this political context, conceptual and substantial difficulties arise in placing Singapore in the democratization debate. Foremost, the tension between the presence of a popularly elected single-party dominant government, and the tendency of this government to impose, through the due parliamentary processes, substantively highly anti-democratic laws and administrative regulations on society. Secondly, the ambivalence of an electorate, which is increasingly willing to voices its dissatisfactions with unacceptable state interventions but without the desire to support he development of strong opposition parties, let alone a change of government. The result is a highly stable polity, which many critics continue to characterize as an 'authoritarian regime'. See, also, Chua Beng-Huat, "Arrested development: democratisation in Singapore" (1994) Third World Quarterly, Vol 15, No 4; Then Prime Minister Goh Chok Tong, "... the system we want is actually one-party and many small parties to keep us on our toes" in '*PAP loss would be 'hard to contemplate given the grave consequences*' Straits Times, Singapore, 10 Dec 1992, 22.

[92] Ho Wing Meng, "Values Premises Underlying the Transformation of Singapore" in Wheatley Paul and Kernial Singh Sandhu, Management of Success: The Moulding of Modern Singapore (Institute of Southeast Asian Studies, Singapore, 1989) 671 – 688

[93] See Zakaria F, "Culture is Destiny: A Conversation with Lee Kuan Yew", (1994) 73 Foreign Affairs 109; "Kim Dae Jung, Is Culture Destiny? The Myth of Asia's Anti-Democratic Values", 73 Foreign Affairs 189 (1994)

[94] Wang Xiaoxuan, "Confucianism, Human Rights and the Rule of Law" (2003) LLM Research Paper, 31 – 32

[95] Justice H. Suresh "The Supreme Court in a Liberal Democracy" http://www.ahrchk.net/pub/mainfile.php/cambodia_Judiciary/111/ <last accessed 27 September 2004> cited in Wang Xiaoxuan, "Confucianism, Human Rights and the Rule of Law", above note 94, 34

government.[96] Confucianism is in direct contravention to democracy and Westminster ideals of the rule of law. A society, which enshrines the outmoded precepts of Confucianism, cannot, in theory, be called a democracy.

Confucianism, 'Asian values' and the Shared Values White Paper have distorted the concept of the rule of law insofar as these doctrines advocate a niggardly approach to individual liberties. As exhorted by the Privy Council[97],

> In a constitution founded on the Westminster model and particularly that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to *'law'* in such contexts as *'in accordance with law', 'equality before the law', 'protection of the law',* and the like, in their Lordships' view, refer to a system of law, which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England

Invocations of Confucianism and "Asian Values" are not authentic and further, conflict with the rule of law. Furthermore, it is significant the Constitution of Singapore lacks a preamble.[98] This makes it easier for extra-textual invocations to be made[99], which may incorporate such principles and values.[100] Where values such as "society before self" are prevalent in a society's political climate, it has the potential to "renovate" the rights conferred on the individual, to the extent of non-existence.

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[96] He Weifang, *The Judicial System and Governance in Traditional China,* in *The Rule of Law – Perspectives from the Pacific Rim* (The Mansfield Center for Pacific Affairs, 2000) 92 cited in Wang Xiaoxuan, "Confucianism, Human Rights and the Rule of Law" (2003) LLM Research Paper, 34

[97] *Ong Ah Chuan v PP,* above note 71, 865 *per* Lord Diplock

[98] "A written constitution is rarely ever a complete document containing all the rules for constitutional government." SA de Smith, Constitutional and Administrative Law, edited by Harry Street and Rodney Brazier (5 ed, Harmondsworth, Middlesex: Penguin Books, 1985), chap. 1; Wheare KC, *Modern Constitutions* (London: Oxford University Press, 1962), chap. 1

[99] Although contrary to the traditionally accepted constitutional interpretation, this approach is consistent with the value identified in Shared Values as community over individual – "the sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution, and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained." *Chan Hiang Leng Colin and Others v Public Prosecutor* [1994] 3 SLR 662 (HC)

[100] "Additional rules, practices, or assumptions, give life to a constitution." Philip N. Pillai and Kevin Tan Yew Lee, "Constitutional Development", as cited in Wheatley Paul and Kernial Singh Sandhu, *Management of Success: The Moulding of Modern Singapore*, above note 92

In such a political climate, procedural safeguards against a permanent erasure of rights are vital, and equally, a purposive approach be taken to rights by an independent Judiciary.[101]

## *III FORM OF THE BILL OF RIGHTS*

### *A Concept of Entrenchment*

Entrenchment of the Bill of Rights as *'Higher Law'* is primarily a procedural safeguard against the excesses of Parliament. The effect of the entrenchment of a Bill or Charter of Rights entails the requirement of *'special majorities'* for the amendment of the fundamental freedoms contained therein. Article 11(2) of the Draft New Zealand Bill of Rights[102] states

> No provision of this Act... shall be repealed, or amended, or in any way altered unless the proposal... (a) is passed by a majority of 75% of all the members of the House of Representatives; or (b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts

Similarly, the requirement of a 75% majority[103] is necessary for Constitutional amendments to be passed in Singapore. As such, entrenchment is a procedural safeguard against the subversion (by the legislature) of Constitutional laws. Without entrenchment of the Bill of Rights, government can potentially ride roughshod over minority interests[104].

Substantively, entrenchment entails the legal concept of a Bill of Rights as *'Higher Law'* or *'Super-Law'*[105], as opposed to ordinary legislation. This principle can

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[101] See *Taw Cheng Kong v PP* [1998] 1 Sing. L. R. 943, 955, para 24H-I (Karthigesus JA) – affirmed *Ong Ah Chuan,* note 89

[102] Draft New Zealand Bill of Rights Bill, LEG 7-1-3, 4 December 1984

[103] Article 5(2) Constitution of the Republic of Singapore 1999

[104] Palmer Geoffrey, *Bridled Power: New Zealand government under MMP* (Oxford University Press, Auckland, 1997) 266

[105] *New Zealand Law Society Submissions on the White Paper* "A Bill of Rights For New Zealand, 20 December 1985 (extract), 140

be found in Article three of the Draft New Zealand Bill of Rights[106] and Article four of the Singapore Constitution 1999. The basis for a *'Higher law'* is derived from the acknowledgment of an individual's intrinsic worth and the inalienability of his/her fundamental liberties.[107] Entrenchment therefore, places the value of the individual above the authority of the State.

With specific regard to BORA, the lack of entrenchment has created an anemic document, which does not correspond to the substantive conception of the rule of law, since it is a constitutional document meant to "affirm and protect fundamental rights and liberties". In its function, BORA is powerless against rights-inconsistent legislation. It is only applicable to bills, that is, legislation in its pre-conceived form.[108] Therefore, BORA is mostly an educative document in its present state, by serving as a guiding light to legislative drafters.

### *B False Entrenchment*

Both Singapore and New Zealand are democracies with popularly elected governments. However, there is a stark difference in their Parliamentary compositions, which has a direct impact on the concept of 'entrenchment' in each jurisdiction. Singapore's Parliament has been described as a 'dominant one-party government', while New Zealand's Parliament, a 'coalition government'. Presently, Singapore's Parliament comprises of 84 seats, 82 of which belong to the People's Action Party (PAP), rendering it a one-party Parliament; New Zealand's Parliament comprises of 120 seats, with seven political parties, with the Labour party presently holding a slim majority of 52 seats.[109]

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[106] Draft New Zealand Bill of Rights Bill, LEG 7-1-3, 4 December 1984

[107] "Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties – not stick and carrot privileges. To the extent that the constitutional is supreme, those rights are inalienable." *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943, 965, para 56D

[108] See *Ministry of Transport v Noort,* above note 52, 283 (CA) applied in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 260 (CA)

[109] http://www.clerk.Parliament.govt.nz/NR/rdonlyres/71EE961C-7DF9-4422-B810-CB3364A86C04/11288/20040615.pdf <last accessed 17 June 2004>; see http://electionresources.org/nz/#2002 <last accessed 17 June 2004>

Based on the Parliamentary compositions of Singapore and New Zealand, it is submitted that 'entrenchment', as a procedural safeguard, would be much stronger in New Zealand than it is in Singapore. In Singapore, that procedural safeguard is exceedingly weak because of the skewed composition[110] of Parliament.[111] While, in theory the Constitution is still the '*supreme law of the land*', in reality, it can be amended as easily as BORA, which has the status of ordinary legislation.[112] Conversely, attaining a two-thirds majority vote in New Zealand, though not impossible, would be a far more challenging task, owing to its proportional party composition.

It has been suggested that the People's Action Party (PAP) as the only government Singapore has known since independence has been the architect of the Constitution.[113] Attempts were made in the past, to install the custodial powers of the elected presidency as a two-key constitutional safeguard against Parliament's intentions[114]; unfortunately, this idea was quickly suspended by government, who sought to restrict the President's powers to non-constitutional Bills.

A one-party system differs from a dominant party system in that in the former, a single political party holds an effective monopoly of power and controls access to government office. This may be provided either by law or written into the Constitution; even where other parties exist, they have little or no effect on the course of events.[115] In this context, the procedural 'safeguard' of '*special majorities*' for constitutional amendment is just about as powerful as a paper tiger. Furthermore, the

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[110] There are 98 seats in Singapore's Parliament at present, of which 96 belong to the People's Action Party and 2 belong to opposition parties.

[111] This is compounded by anti-party hopping legislation, article 46(2)(b), Republic of Singapore Constitution 1999

[112] It is interesting to note that the alternative suggestion of checks *within* Parliament itself has been a common theme in both countries. In the preliminary stages of drafting the Bill of Rights, it was proposed in the White Paper that New Zealand should instate an upper house, instead of a supreme Bill of Rights, to serve as a check on Parliament. Similarly, in Singapore, the notion of extending the powers of the elected presidency to include final veto powers against the enactment of rights-inconsistent legislation was proposed. Both these ideas eventually lost enthusiasm and became moribund.

[113] Thio Li-Ann, "Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terrors and *Tudungs*, Women and Wrongs" (2002) SJLS 328, 330; Kevin YL Tan, "The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day" (1989) 1 S Ac LJ 2, 6 – 17

[114] Article 22H(1) Constitution (Amendment No 3) Bill 1990

[115] Huntington SP and Moore CH, *Authoritarian Politics in Modern Society* (Basic Books, London, 1970)

lack of opposition MPs[116] in Parliament compounded by anti-party-hopping legislation[117] means that public policies are dictated rather than discussed.

### *C The Case for and against Entrenchment*

It has been asserted, axiomatically that entrenchment, both in terms of procedural safeguards, and in substance, is a necessary feature of any constitution or Bill of Rights. This argument is best articulated in the well-known case of *Marbury v Madison*[118], *per* John Marshall CJ

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it... If the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. It would be given to the legislature a practical and real omnipotence, with the same breath, which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Conversely, the argument for entrenchment appears to stem solely from the fear of the tyranny of Parliament, if left unchecked, to pass laws "against common right and reason, or repugnant, or impossible to be performed".[119] The significance of English jurist Sir Edward Coke's argument is that the principle of a fundamental law as a limitation upon government is involved and as its corollary, that the judges

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[116] Of the 6 parties participating in the 2001 Elections, only 2 parties won 1 seat each in Parliament, leaving the rest of the 82 seats to the People's Action Party (PAP) http://straitstimes.asia1.com.sg/ge/ <last accessed 12 May 2004>

[117] Article 46(2)(b), Republic of Singapore Constitution, If an MP changes party he loses his seat in Parliament

[118] See *Marbury v Madison* [1902] 1 Cranch 137 (Supreme Court, United States of America)

[119] See Dr Bonham's Case [1610] 8 Co Rep 114, 118 (Court of Common Please, England), per Coke CJ, "And it appears in our books, that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void."; note that Coke dismissed the *Bonham* principle as "obsolete" in AV Dicey, *Introduction to the Study of the Law of the Constitution,* above note 49, 61

should be the sole interpreters of the fundamental law.[120] An entrenched Bill of Rights protects minorities and disadvantaged groups against the tyranny of the majority by acting as a safeguard against an insidious or a casual erosion of rights. This point was well expressed in the White Paper (1985) on the Bill of Rights for New Zealand[121]

> The power of the government, alone and through Parliament, without the restraint or even the day, which would come from a second chamber, is enormous. In some cases it can be compared with the power, claimed as well as actual, of the Stuart Kings before the revolution of the seventeenth century. The basic difference between then and now is of course the electorate. But the electorate's role cannot, in the usual case, be focused on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues.

The case against entrenchment, on the other hand, stems from the fear of the tyranny of the Judiciary[122], as unelected representatives of the will of the people, and its sole control over the common law development of fundamental freedoms through reading-down or reading-in limitations[123] to these inalienable rights. This can be largely attributed to the prevalence of the Westminster culture, which has foisted upon New Zealand's political culture the unshakeable belief that the traditional role of judges is to apply the laws passed by Parliament, not to pass judgment upon their reasonableness or otherwise.[124]

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[120] See Patterson CP, "The Evolution of Constitutionalism" (1948) 32 Minnesota LR 427 – 457

[121] *A Bill of Rights for New Zealand: A White Paper,* A.6 *Appendices to the Journal of the House of Representatives,* Wellington, 1985 at 27; See also Palmer Geoffrey, *Bridled Power: New Zealand Government under MMP* (Auckland, Oxford University Press, 1997) 264 – 277

[122] For counterarguments, see Cardozo B, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) 141; "The stock argument against entrenching human rights is that it transfers power to non-elected judges." Lord Cooke of Thorndon, "The Role of Judges" in *Building the Constitution,* above note 39, 375

[123] "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law", *A-G v Moagi* [1982] 2 BLR 124, 184

[124] Rishworth, "Reflections on the Bill of Rights after *Quilter v Attorney-General*" (1998) NZ Law Review 683, 691-692

It has also been argued that having an entrenched Bill of Rights does not necessarily accord with democratic ideals because it prevents the minority voice of the individual citizen from being heard on issues of rights.[125]

In addition, the fear of entrenchment also stems from the fear of laying down a fossilized formulation of rights, which may lose its relevance for future generations. It has been argued that the whole point of a written constitution is to lock in a particular structure and make change very difficult; and further, that this is justifiable only if those doing the locking-in know what is best for later generations.[126]

The common ground in the arguments for and against entrenchment is the acknowledgment that the individual citizen requires special protection from the hegemonic State through the protection of his/her inalienable rights and freedoms; the divergence of opinion commences on the issue of whether the citizen's rights necessitate protection from Parliament or the Judiciary.

Ultimately, the lack of entrenchment of a Bill of Rights means the Courts cannot strike down an Act of Parliament as being unconstitutional. In a Westminster system of Parliamentary sovereignty, there is no institution higher than Parliament to serve as a check on Parliament.[127]

Arguably, there is no need for such a check in a system of parliamentary supremacy, since the safeguard of civil liberties is provided through open

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[125] The reason given is that an entrenched Bill of Rights effectively gives judges sole power to decide Rights issues, rather than Parliament. See Waldron J, 'A Right-Based Critique of Constitutional Rights' (Spring 1993) at 358

[126] Allen J, "No to a Written Constitution" in *Building the Constitution*, above note 39, 374

[127] "This is a mythical and false assumption in the context of the modern day pluralist society. Not only does the parliamentary executive control Parliament through the vehicle of the party system, the mandate wielded by the parliamentary majority is at best imperfect and temporal. Judicial review leaps into the fray as an important countermajoritarian check. It is the method by which fundamental constitutional values 'trump' the short term values embodied in legislation. Historically, judicial review arose as a response to the post-Holocaust fear that laws as evil as those contained in Nazi edicts might be promulgated without check by the legislature." Thio Li-Ann, "Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?" SJLS (1997) 257

participatory democratic elections.[128] Ultimately, this is an expression of faith in the hypothetical internal checks available within an "illimitable" Parliament.[129]

### *D The Normative Role of the Judiciary*

The common law embodies a philosophy, which respects the dignity and liberty of individuals.[130] As TRS Allan notes:

> The Rule of Law, as a juristic principle, thus embodies the liberal and individualistic bias of the common law in favor of the citizen. It transcends the principle of legality by authorizing and demanding, an attitude of independence and skepticism on the part of the judges in the face of claims of government power[131]

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[128] "The open, fully participatory, referendum process in which each voter's say counts as much as any other's is the one I prefer. Until such time as the majority of New Zealanders want fundamental constitutional change, it should not happen. On such matters as a written constitution I hope it never happens." Allen J, "No to a Written Constitution" in *Building the Constitution*, above note 39, 395; Conversely, "The stock argument against entrenching human rights is that it transfers power to non-elected judges. In the eyes of those who have come to favor entrenchment, and in widespread international opinion, this misses the point. The protection of minority rights is a key element of democracy. There are certain basic rights of membership of a national society, which should not be capable of being overridden by a bare majority. Minority rights should not depend on the pleasure of the majority. Non-elected judges are an essential insurance against the dictation of the majority. Which means that the judges bear a heavy responsibility and that the best methods of their selection must be assiduously sought. Balanced courts are as crucial as balanced rights. But, unless one of the paramount tasks of the courts is to enforce human rights, the position can resemble that in the former Soviet Union: high-sounding promulgation of the rights, largely meaningless as judicial enforcement was excluded" Lord Cooke of Thorndon, "The Role of Judges" in *Building the Constitution*, above note 39, 375

[129] For example, the primary convention that Parliament will not legislate for tyrannical or oppressive purposes is problematic because what is tyrannical or oppressive involves subjective evaluation. There is no consensus on what these terms mean, or whether, in any case, Parliament has overstepped the bounds of propriety, see Joseph P, *Constitutional and Administrative Law in New Zealand*, (2 ed, Brookers, Wellington, 2001) 290; A less ambiguous convention is that Parliament should not pass legislative judgments interfering with the administration of justice, see SA de Smith and R Brazier, *Constitutional and Administrative Law* (8 ed, Penguin Books, London, 1998) 366; The Clutha Development (Clyde Dam) Empowering Act 1982 was arguably unconstitutional as being in breach of this convention. This Act reversed a decision reached by due process of law through the Planning Tribunal and High Court and denied the successful litigants the fruits of judicial victory, see Palmer Geoffrey, *Unbridled Power* (2 ed, Oxford University Press, Auckland, 1987) 196 – 198

[130] Rutter MF, *The Future of the Common Law, in The Applicable Law in Singapore and Malaysia: A Guide to the Reception, Precedent and the Sources of Law in the Republic of Singapore and the Federation of Malaysia* 575 (1989), 574

[131] Allan TRS, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", (1985) 44 Cambridge L.J. 111, 119

Therefore, the normative approach is that Courts have an interpretative monopoly.[132] Central to arguments of advocates for the strengthening of the interpretive function of a Bill of Rights, otherwise known as the 'common law model' is the assertion that this implies no strong challenge to parliamentary sovereignty.[133]

However, it is submitted that a limited qualification of legislative power in the safeguard of rights is both an inevitable corollary and a necessity.[134] Further, this should not be seen as an undesirable consequence. A Bill of Rights ought to provide some form of procedural safeguard, however minute, against statist incursions into minority rights.

The distrust of judges is exaggerated. The doctrine of purposive interpretation, and the cardinal principle of the rule of law and natural justice[135] restrain "judicial activism" of the sort expressed in the Parliamentary White paper[136], as enunciated by Cardozo[137]

> A judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own idea of beauty or of goodness. He is to draw inspiration from consecrated principles.

Nonetheless, in relation to BORA, the independence of the Judiciary is not enough; since section four of BORA *expressly* restrains the Courts from over-ruling rights-inconsistent legislation.

Conversely, section three of BORA expressly stipulates that the Act applies to the legislature, executive and judicial branches of the Government of New Zealand, or

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[132] Allan TRS, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) C.L.J. 87, 102

[133] Craig P, "Constitutional Foundations, the Rule of Law and Supremacy" (2003) Public Law 92, 107 – 108

[134] Allen TRS, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?" above note 130, 94

[135] In the discharge of their judicial duties, judges are bound by the requirements of natural justice at common law and under BORA s. 3, s. 27(1)

[136] *A Bill of Rights for New Zealand: A White Paper,* A.6 *Appendices to the Journal of the House of Representatives,* Wellington, 1985; "The fears expressed in the mid-1980s were than an entrenched Bill of Rights would transform our courts into political institutions by empowering them to overrule Parliament or government action and that this involved substantial risk." Palmer, Geoffrey, *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997) 266 – 267

[137] B Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) 141

any other person, or body in performance of public function, power or duty conferred or imposed by law; the implication being, that it was intended to restrain the powers of government from unduly wresting the inalienable rights of the individual.[138]

The Diceyan doctrine that Parliament is illimitable to the extent that it cannot even bind its own successors is fallacious, as discussed earlier, "if the doctrine of parliamentary sovereignty involves the attribution of unrestricted power to parliament, the dogma is no better than a legal fiction"[139]

## *E The Purposive Approach to Rights*

### *1. Principle*

The fear that entrenchment would freeze the ambit of fundamental liberties rather than extend them, as a result of stricter amendment procedures, is misguided. The argument follows that by not entrenching the Bill of Rights[140]

> [Rights] are capable of development. There is room for experiment, for pushing the boundaries against discrimination wider. If the movement goes too far, legislation can step in and set narrower lines.

The fallacy of this argument is exposed by the legal principle of purposive interpretation, which governs constitutional interpretation.[141] As elaborated by Lord Wilberforce in *Fisher*[142], the purposive approach calls for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

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[138] See G Palmer, *Bridled Power: New Zealand Government under MMP,* 2 ed (Auckland, Oxford University Press, 1977) 264, "[BORA] begun its life as a constitutional sledge-hammer, but in its final form it did not give to the courts power to strike down legislation inconsistent with it."
[139] Dicey AV, *Introduction to the Study of the Law of the Constitution,* above note 49, 71
[140] Tollemache Nadja, *The Proposed Bill of Rights: A Discussion and Resource Paper prepared for The Human Rights Comission* (March 1986) 65
[141] On constitutional interpretation generally, see Chester James Antieau, *Constitutional Construction* (Oceana Publications, New York 1982)
[142] *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

## 2. *New Zealand*

The purposive approach better conforms to the Long Title of the Bill of Rights, which states that the purpose of the Act is to affirm, protect and promote human rights and fundamental freedoms in New Zealand and has been affirmed by the Court of Appeal in various decisions.[143]

A purposive approach allows for the growth and development of constitutional rights in tandem with social change, as elaborated by Dickson J in the Canadian case of *Hunter v Southam*[144]

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future.

Canadian common law has consistently affirmed the purposive approach as well.[145] This is significant because the BORA was in large measure, drawn from the Canadian Charter of Rights and Freedoms, therefore "Canadian decisions can be expected to assist in interpretation so long as there is borne in mind the different status enjoyed by the Charter"[146]

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[143] See Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439, 440; [1990–92] 1 NZBORR 1 (CA), *Ministry of Transport v Noort*, above note 52, 282; (1992) 8 CRNZ 114; 1 NZBORR 97 (CA) at 268 (Cooke P) and 292 (Gault J), *R v Goodwin* [1993] 2 NZLR 153 (CA) 168 (Cooke P), and *R v Te Kira* [1993] 3 NZLR 257 (CA) 261 (Cooke P)

[144] *Hunter v Southam* [1984] 2 S.C.R. 14, 155 per Dickson J "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights,* for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The Judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

[145] "This Court has on numerous occasions stated that the proper approach to interpreting the meaning of the rights and freedoms guaranteed by the Charter is to adopt a purposive analysis" *Hunter v Southam Inc.* (1984) 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, (1984) 2 S.C.R. 145; *R v Big M Drug Mart Ltd* (1985) 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 1 S.C.R. 295; *R v Brydges* (1990) 53 C.C.C. (3d) 340

[146] *MOT v Noort,* above note 52, 292 per Richard J

Judicial interpretations of the law must always defer to clear expressions of Parliamentary intent. However, judicial craft is such that judges can often find enough ambiguity and lack of clarity in statutes to permit them to bring the statutes into line with the judges' understanding of the spirit of the common law.[147] In this context, the approach of purposive interpretation further mandates the Judiciary to give full effect to rights and freedoms, regardless of the status of the Bill of Rights[148]

> The fundamental freedoms affirmed in BORA are to be given full effect and are not to be narrowly construed. Its provisions are to be construed to ensure its objects of protecting and promoting human rights and fundamental freedoms. It is a statute, not an entrenched constitutional document, but it is couched in broad terms requiring interpretation appropriate to these objects

Therefore, the adoption of the purposive approach by the courts in New Zealand is indicative of two facts – firstly, that *without* entrenchment, the courts in New Zealand will continue to make good use of the interpretive function of BORA to read-*in* constitutional principles into common law, rather than *out*; Secondly, that the fear that the entrenchment of BORA would lead to a fossilization of rights irrelevant to the next generation is misguided. Rights are not static, but evolutionary and capable of growth with the times.

More importantly, it is the spirit of BORA, which has had direct application to common law in New Zealand. In her decision at first instance, Elias J gave perhaps the clearest judicial recognition to that effect[149]

> In my view, BORA protections are to be given effect by the Court in applying the common law... The application of the Act to the common law seems to me to follow from the language of s 3, which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian Charter... BORA is important contemporary legislation, which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgements in such

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[147] Dyzenhaus David, "Rethinking the Process/Substance Distinction: Baker v Canada" University of Toronto Law Journal (Summer, 2001) 193, 197
[148] *MOT v Noort,* above note 52, 292
[149] *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC)

> legislation. They are authoritative as to where the convenience and welfare of society lies.

It has been recognized that the status of BORA is not only comparable to ordinary legislation, but in fact, it is the weakest piece of legislation in the legal framework owing to section four[150]. It is a statute that loses to *all* other pieces of legislation; it does not even impliedly repeal existing legislation with which it is inconsistent. Nonetheless, by virtue of the doctrine of purposive interpretation, which the Courts adopt, the function of BORA is expanded slightly beyond its educative role.

### 3. *Singapore*

In Singapore, the purposive approach to rights is, in writing, accepted by the Courts to be adopted approach in interpreting the Constitution to give effect to the intent and will of Parliament.[151] However, the principle as set out in *Fisher*[152], is drastically refurbished in the Singaporean context[153]

> The principle to be applied is that the words of the Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

The intention is to be found at the time that the law was enacted or in some circumstances when it subsequently reaffirms the particularly statutory provision, as evident from the Interpretation Act[154]. Nonetheless, case law has shown that in dealing with the fundamental rights, the approach adopted is *not* the *Fisher*[155]

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[150] Section four BORA, '*Other Enactments not Affected*', above note 2
[151] See Constitutional Reference No 1 of 1995 [1995] 2 SLR 201 (Constitution of Singapore Tribunal) per Yong Pung How CJ
[152] *Minister of Home Affairs v Fisher* [1980] AC 319, 328.
[153] Driedger EA, *Construction of Statutes* (2 ed, 1983) 87 (as quoted in) Constitutional Reference No 1 of 1995 [1995] 2 SLR 201 (Constitution of Singapore Tribunal) per Yong Pung How CJ
[154] section 9A Interpretation Act (Cap 1), which states: "(1) an interpretation that would promote the purpose or object underlying the written law (whether the purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object"
[155] *Minister of Home Affairs v Fisher*, above note 151, 328.

approach, but one which, places national interest as paramount, per Yong Pung How CJ[156]

> The Constitution is primarily to be interpreted within its own four walls and not in light of the analogies drawn from other countries such as Great Britain, the United States of America or Australia

In tandem with the move to be more assertive in the development of local jurisprudence, the Application of English Law Act (Cap 7A)[157] seeks to delineate the extent to which English law is applicable in Singapore. This mandates the Court's adoption of a dialogical[158] approach to English case law. This approach allows the Courts to look to foreign cases *selectively*, based on the "four walls" approach, which suggests, constitutional law is often regarded as *sui generis*, calling for a unique interpretive approach.

Yet another example of the selective use of foreign constitutional cases can be seen in the case of *Jabar v PP*[159], a Court of Appeal case involving a constitutional challenge to a delay in imposing the death penalty. After reviewing and distinguishing the jurisprudence of the Indian Supreme Court and Privy Council (on appeal from Jamaica) based on a detailed analysis of their reasoning and respective constitutional texts, the Court of Appeal adopted, without further analysis of reasoning or constitutional text, the decision of the United States Court of Appeals, Ninth Circuit, in *Richmond v Lewis*[160].

Furthermore, the guideline to "purposive interpretation", in Singapore, as outlined in section 9A of the Interpretation Act (Cap 1), adopts an interpretation that

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[156] *Chan Hiang Leng Colin & Ors v PP* [1994] 3 SLR 662 (HC) The issue here was whether the Minister's decision to de-register the Jehovah's Witnesses as a society violated article 15 of the Constitution, citing *State of Kelantan v Federation of Malaysia* [1963] MLJ 355, 358.

[157] Which came into force on 12 November 1993

[158] "It is important to distinguish courts' use of foreign cases, which might involve merely citing them, from their engaging with and applying them. There is no question that the Singapore courts use foreign cases, as the foregoing discussion has shown. What is less clear is the extent to which the courts engage with these cases (the essence of the dialogical approach), let alone apply them, say, as 'persuasive authority", See Ramraj V, "Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia" 6 Sing J Int'l & Comp. L. 302; Also see Glenn HP, "Persuasive Authority" (1987) 32 McGill LJ 261

[159] [1995] 1 SLR 617

[160] *Richmond v Lewis* [1990] 948 F2d 1473

promotes the purpose or object underlying the written law by looking at extrinsic material, *inter alia*, the explanatory statement of the Bill and parliamentary record of debates. Given the People's Action Party's (PAP) dominance of Parliament, the purposive approach is really more of a political tool, than a shield for rights.[161]

The paradox of the "purposive approach" adopted in Singapore, is that it is really a literalist approach, which accords primacy to the intent of the legislative drafters, rather to substantive values such as the intrinsic dignity of the individual. Such a literalist approach wrests from the equation, a substantive safeguard to fundamental rights and liberties. Nonetheless, in the scheme of an entrenched Bill of Rights, the Judiciary is well placed to strike down rights-inconsistent legislation, by virtue of the primacy of the Constitution. However, as this paper will show, such an approach has not been widely embraced by the Courts in Singapore. In its place, the communitarian ethos of Confucianism, and the paramountcy of national security interests have been invoked – resulting in an unwarranted "Statist legalism" – both procedural and substantive conceptions of the rule of law being construed to serve the interests of the executive and ultimately, the State, over the individual.

## *IV FUNCTION OF THE BILL OF RIGHTS*

### *A Judicial Review and the Power to Strike Down*

#### *1. New Zealand*

Judicial review and the power to strike down (constitutionally inconsistent legislation) stems from this notion of constitutional supremacy, as set out in *Marbury v Madison.*[162] Judicial review arose as a response to the promulgation of rights-inconsistent laws during the world wars of the twentieth century.[163] The absence of

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[161] Tan Eugene Kheang, "Laws and Values in Governance: The Singapore Way" Hong Kong Law Journal (2000) 91, 97

[162] *Marbury v Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803)

[163] "...the nineteenth century was heavily influenced by positivist thought, which feared any attempt by the Judiciary to impose higher or constitutional standards on ordinary legislation. The popular legislature was seen as the only source of law, and its statutes were to control all cases brought before the courts. When the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the

this 'striking-down' power was the Human Rights Committee's first objection to the BORA.[164] However, it has been observed that even in legal systems where the power to strike-down is available, this power is hardly used. In the United States and Canada, where courts have the power to invalidate legislation, "bad" rules stay on the books unless and until they are squarely and successfully challenged in the courts.[165] As such, the focus should not be on what is possible by way of a rights regime, but rather a question of what is the constitutional practice – does the legislature routinely pass laws that are an affront to human rights?[166]

It has been suggested that in New Zealand, we have a Judiciary who are beginning to assert what had been thought of as a long obsolete power of judicial review and have done this without the assistance of a Bill of Rights.[167] As cited in the White Paper, *per* Cooke J[168]

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them

Whether the above observation is true or false, in law, the power to strike down inconsistent legislation is not within the ambit of BORA.[169] This is true of enactments[170] passed before or after the commencement of BORA.

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Judiciary as a check against legislative disregard of principles once considered immutable. They began, in a sense, to 'positivize' these principles, to put them in written form and to provide legal barriers against their violation." Mauro Cappelletti, *Judicial Review in the Contemporary World*, (1 ed, Bobbs-Merrill, Indianapolis, 1971) 118

[164] The second objection of the Human Rights Committee to the New Zealand Bill of Rights was its inability to grant remedies to individuals, because remedies depend on the ability of courts to invalidate rules.

[165] Mclean Janet, "Legislative Invalidation, Human Rights Protection and s. 4 of the New Zealand Bill of Rights Act" (2001) NZLR 421, 425

[166] Mclean Janet, *Legislative Invalidation, Human Rights Protection and s. 4 of the New Zealand Bill of Rights Act* , above note 164, 426

[167] Tollemache Nadja, *The Proposed Bill of Rights: A Discussion and Resource Paper prepared for the Human Rights Commission* (March 1986) 66

[168] *Taylor v NZ Poultry Board* [1984] NZLR 394, 398 per Cooke J. See *A Bill of Rights for New Zealand: A White Paper* (New Zealand. Parliament. House of Representatives. 1985. AJHR. A6) para 7.16

[169] Section four of the New Zealand Bill of Rights Act, above note 2

[170] For the definition of 'regulations' see Interpretation Act 1999, s 29; as to the Interpretation Act definition of "enactment" applying to that term as it is used in BORA, see *Drew v Attorney-General* [2002] 1 NZLR 58, 73; (2001) 18 CRNZ 465; 6 HRNZ 368 (CA) at 383. "Act" means an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand: Interpretation Act 1999, s 29, definition of "Act".

## 2. *Singapore*

In Singapore, while the constitution provides for judicial power to be vested in the judiciary, it usually does not provide that the Courts have the authority to make pronouncements on the constitutionality of statutes passed by the legislature. Nonetheless, this authority is to be found in the inherent power of the court, and it is asserted by the Courts themselves.[171]

Significantly, judicial review and the power to strike-down have been furthered watered down in critical areas of law[172] by constitutional amendments made by Parliament. The Judiciary's single attempt at striking down unconstitutional enactments was legislatively over-ruled by Parliament.[173] In a landmark judgment, the Court of Appeal in *Chng Suan Tze* v *Minister of Home Affairs*[174] quashed a preventive detention order issued under the Internal Security Act (ISA), which conferred broad, intrusive powers on the Minister of Home Affairs to authorize detention orders curtailing the constitutionally guaranteed right to personal liberty.[175] This led to the amendment of section 8B(2), Internal Security Amendment Act (Act 2 of 1989)[176], which reads

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

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[171] Tan, Yeo and Lee, *Constitutional Law in Malaysia and Singapore* (2 ed, Butterworths, Asia, 1997) 331

[172] For example, preventive detention under the Internal Security Amendment Act (Act 2 of 1989) and the Minister's discretion to curb religious freedom, Maintenance of Religious Harmony Act (Cap 167A) s 8, s 18

[173] Constitution of the Republic of Singapore (Amendment) Act 1989 (No 1 of 1989) which came into effect on 27 January 1989

[174] *Chng Suan Tze v Minister of Home Affairs* [1989] 1 MLJ 69

[175] For a critical analysis of the operation of judicial review in Singapore, see Thio Li-Ann, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?* (1997) SJLS 240 – 290

[176] For the reasons behind the amendment, see *Singapore Parliamentary Debates*, 25 January 1989, Second Reading, Internal Security (Amendment Bill) cols 531-533; 463-474.

Subsequent cases have affirmed the legality of the above provision in excluding judicial review in respect of detention orders.[177] The existence of the ISA empowers Parliament to enact rights-inconsistent legislation. Therefore, while there is a 'striking-down' power, as well as a power of judicial review conferred on the Judiciary within the Constitution of Singapore, in reality, the powers of review are limited to aspects of procedural impropriety rather than substantive fairness and natural justice.

The constitutionality of the ISA amendment, challenged in the subsequent High Court case of *Teo Soh Lung*[178] was perfunctorily ignored by the High Court, who simply reaffirmed the legitimacy of the new law[179]. This is an affront to natural justice, which is based on the principles of the right to a fair hearing (*audi alteram partem*), and the rule against bias (*nemo judex in causa sua*). Secondly, the new amendment, which in application freezes statutory law to an earlier date[180], creates law, which is in essence, retrospective – this is an affront to the rule of law.[181]

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[177] *Teo Soh Lung v Minister for Home Affairs* [1989] 2 MLJ 449 and *Vincent Cheng* v *Minister for Home Affairs* [1990] 1 MLJ 449; See Yee, Ho & Seng, "Judicial Review of Preventive Detention under the ISA" (1989) 10 Sing LR 66.

[178] *Teo Soh Lung v Minister for Home Affairs* [1989] 2 MLJ 449 and *Vincent Cheng* v *Minister for Home Affairs* [1990] 1 MLJ 449; See Yee, Ho & Seng, "Judicial Review of Preventive Detention under the ISA" (1989) 10 Sing LR 66.

[179] "Section 8B(1) clearly lays down clearly lays down the subjective test applies to the exercise of the powers pursuant to ss 8 and 10 of the ISA and s 8B(2) provides that there is to be judicial review only in regard to any question relating to compliance with any procedural requirement of the ISA governing such act or decision", per Chua J, *Teo Soh Lung v Minister for Home Affairs,* above note 177, 449

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

[181] "(1) All laws should be prospective, open and clear... (2) Laws should be relatively stable... (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules", Raz Joseph, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195, 196; also Fuller also fleshes out his idea of procedural law by explaining what would constitute a violation, "When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality--when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law." Fuller Lon, "Positivism And Fidelity To Law: A Reply To Professor Hart" (1958) 71 Harv L Rev 630, 660

In one fell swoop, the Courts have discarded both procedural and substantive safeguards provided for by an entrenched, supreme Constitution.[182]

## *B The Interpretive Function*

### *1. BORA Section Six*

Aside from the function of a Bill of Rights to invalidate legislation, it also possesses an interpretive function. In New Zealand, this interpretive function is vital[183] owing to its inability to invalidate legislation. This interpretive function is well set out in section six of BORA, which states[184]

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The threshold of 'inconsistency' can be found in section five of BORA, which sets out justified limitations, on the basis that rights are not absolute. The Court need only find an interpretation, which amounts to a 'reasonable' limit, justifiable in a free and democratic society.[185] Once consideration has been given to section five, section six requires a Court to adopt the interpretation of a statutory provision that places the least possible limitation on a guaranteed right or freedom[186], as set out by the Court of Appeal in *Moonen v Film and Literature Board of Review.*[187]

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[182] See *Jabar v PP* [1995] 1 Sing. L. R. 617 (CA) held, "Any law, which provides for the deprivation of a person's life or personal liberty is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well"

[183] The query was made that if full incorporation (of the Bill of Rights) was rejected, at least for the time being, the issue follows as to the content of an interpretative Bill. See Lord Cooke of Thorndon, "Mechanisms For Entrenchment And Protection Of A Bill of Rights: The New Zealand Experience" (1997) 4 EHRLR 5, 490 – 495

[184] Section six of the New Zealand Bill of Rights 1990

[185] See generally, The Laws of New Zealand (Butterworth) Human Rights, Part I (4) para 42

[186] It is important to note that the dicta set out by the Court of Appeal in *Moonen*, need not necessarily be followed. See, The Laws of New Zealand (Butterworth) Human Rights, Part I (4) para 42

[187] *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; (2002) 6 HRNZ 623 (CA)

## 2. *The Strength of BORA Section Six*

While it has been argued that the Courts in New Zealand have taken a robust approach to human rights[188], the same cannot be said of the Courts' approach to BORA itself. It is submitted that the potential of section six of BORA, which sets out the interpretive function of the Bill of Rights, is stymied by section four of BORA; section four prevails because of the lack of entrenchment and supremacy of BORA.

The approach taken by the Courts of New Zealand to section six of BORA has sidelined the role of the Bill of Rights. Firstly, if there is another basis for holding that an enactment is impliedly repealed or revoked, or otherwise rendered invalid or ineffective, other than due to its inconsistency with BORA, the fact that it is also inconsistent with BORA does not prevent a Court from holding it to be impliedly repealed or revoked, or otherwise invalid.[189] Secondly, with regards to regulations, if the relevant regulation-making power is capable of being interpreted so as to authorize the making of BORA-inconsistent regulations[190], the BORA cannot invalidate any inconsistent regulations passed under it. In such a case the regulations would be unlawful not by reason of their inconsistency with BORA, but rather by reason of their inconsistency with the statutory regulation-making power, as interpreted consistently with BORA.[191]

The status of BORA as ordinary legislation is in large part, the reason for this cursory regard to a document, which should in fact be regarded as the fundamental law of the land. Furthermore, owing to section four, BORA in its conception, is in fact, the weakest piece of legislation in the legal framework.[192] It is a statute that loses to *all* other pieces of legislation; it does not even impliedly repeal existing legislation with which it is inconsistent.

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[188] Mclean Janet, *Legislative Invalidation, Human Rights Protection and s. 4 of the New Zealand Bill of Rights Act* [2001] NZLR, 436

[189] See *Drew v Attorney-General* [2002] 1 NZLR 58; (2001) 18 CRNZ 465; 6 HRNZ 368 (CA); The Laws of New Zealand (Butterworth) Human Rights, Part I (4) para 43

[190] Section four of the New Zealand Bill of Rights Act 1990, above note 2

[191] See *Drew v Attorney-General* [2002] 1 NZLR 58 at 73; (2001) 18 CRNZ 465; 6 HRNZ 368 (CA); The Laws of New Zealand (Butterworths) Human Rights, Part I (4) para 43

[192] Section four BORA, above note 2

It has been suggested that for a court to delve into issues of justifiability and/or reasonableness of statutory provisions is an illegitimate waste of judicial resources, because it is irrelevant to the ultimate resolution of a legal dispute, for even if a statutory provision unjustifiably limits BORA rights, section four means that it is nonetheless the law and must be applied by the judges.[193]

### *C. Some Conclusions*

In Singapore, judicial review on substantive grounds has been greatly narrowed through constitutional amendments and the enactment of ouster clauses[194]. Where ministerial discretion is exercised in a manner that is 'arbitrary and untrammeled', the Courts may intercede to uphold natural justice. As such, the wording of Part IV of the Constitution itself provides no standards aside from procedural limits, which might constrain legislative power,[195] resulting in the death of the interpretive function of Part IV of the Constitution.

One should not discount the interpretive function of a Bill of Rights[196]. Under all constitutional regimes that give courts power to strike down legislation, an interpretive remedy is preferred on the presumption that interpretation is less intrusive on the legislative branch of government.[197] The issue then is, can the interpretive function of BORA be strengthened without the need for entrenchment of the Bill itself. The next part of this paper furnishes a normative framework of how this can be done.

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[193] Butler Andrew S, "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" 2000 NZ Law Review 43, 53

[194] See Thio Li-Ann, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?* (1997) Singapore Journal of Legal Studies, 243

[195] In *Teo Soh Lung* v *Minister for Home Affairs* [1989] 2 MLJ 449, per Chua J at 457I-458A: "It is erroneous to contend that the rule of law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review or other actions. Parliament has done no more than to enact the rule of law relating to the law applicable to judicial review." The judge in the subsequent case of *Vincent Cheng* v *Minister for Home Affairs* [1990] 1 MLJ 449 adopted Chua J's judgment in *Teo*

[196] The President of the Court of Appeal described section six as "one of the key features" of BORA, *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272; (1992) 8 CRNZ 114; 1 NZBORR 97 (CA), per Cooke P

[197] Mclean Janet, *Legislative Invalidation, Human Rights Protection and s. 4 of the New Zealand Bill of Rights Act* (2001) NZLR, 428

## V NATURE OF RIGHTS

"It is both an exciting time and a confusing time to be a civil liberties lawyer"[198]

### *A The Context of Rights*

Rights are principles of deep and pervasive concern.[199] Rights do not exist in a vacuum but compete with conflicting interests in any given society. A legal right that finds protection in a Bill of Rights finds it under the auspices of some canonical form of words in which the provisions of the charter are enunciated.[200] When rights find statutory expression in a Bill of Rights, or an entrenched constitution, they are neither absolute nor literal guarantees. The nature of rights necessitates the striking of a "constitutional bargain"[201] between an individual liberty and the right of the community to enjoy the preservation of potentially competing community interests in public order, health and morality. The "constitutional bargain" is largely determined by culture; and illegitimately by politics. The responsibility then falls either to the Judiciary or to Parliament to make this determination for society, depending on whether the Bill of Rights is entrenched, or non-entrenched.

Raz, in considering the relation between the rule of law and other values the law should serve, exhorts that[202] "it is of particular importance to remember that the rule of law is essentially a negative value. It is merely designed to minimize the harm to freedom and dignity, which the law may cause in pursuit of its goals"

In this part, the analysis of rights protection in New Zealand and Singapore will focus specifically on freedom of expression.[203] This rights discourse will be

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[198] Whitty N, Murphy T, and Livingston S, *Civil Liberties Law: The Human Rights Act Era* (Butterworths, London, 2001) v.
[199] See Waldron J, 'A Right-Based Critique of Constitutional Rights' (Spring 1993)
[200] See Waldron J, 'A Right-Based Critique of Constitutional Rights' (Spring 1993)
[201] Tan, Yeo and Lee, *Constitutional Law in Malaysia and Singapore* (2 ed, Butterworths, Asia, 1997) 515
[202] Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195, 196
[203] "The subject of civil liberties is best viewed as being concerned with those freedoms, which are essential to the maintenance and fostering of our representative government", See Feldman David, *Civil Liberties and Human Rights in England and Wales* (2 ed, Oxford University Press, Oxford, 2002) Part II

premised on the assumptions that (1) rights are inalienable; (2) rights are not absolute, but qualified; (3) rights are not universal, but relative.

### 1. *Freedom of Expression*

In principle, freedom of expression is important in promoting open discussion to the discovery of truth, and protecting freedom of conscience.[204] However, democratic ideals necessitate justifiable limits upon freedom of expression where they conflict with the rights of others. The balance must be attained between the importance of free speech as an integral aspect of every individual's right to self-development and fulfillment, and its harmful effects on society – the justification for censorship laws.[205]

As enunciated by JS Mills, "No law should prevent the existence of the free will of the individual, without good cause". From this statement of principle, one may conclude that the exercise of right entails, reasonable restraints, "good cause" or 'justifiable limitations'. Concededly, some regulation of the free speech market-place may be considered, if any expression is to be effective. However, it is noteworthy that government intervention should always be *minimal*, if only enough to prevent hate speech, and speech that may incite violence – any more would serve as an obstacle towards the discovery of truth, and the exercise of one's freedom of conscience.[206]

### 2. *Justifiable Limitations*

The utilitarian calculation of the concept of justifiable limitations provides that guarantees in a Bill of Rights are representations of the ongoing conflicts between the individual and the State; they are not in terms, the resolution of them.[207] It is at this juncture that two observations may be made – firstly, that the balance between individual rights and social cost require constant fine-tuning; secondly, that the

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[204] Thio Li-Ann, "An 'i' for an I", (1998) 9 Ind. Int'l & Comp. L. Rev. 259
[205] Barendt Eric, Freedom of Speech (Oxford: Clarendon Press, 1985) 8
[206] Barendt Eric, Freedom of Speech, see note 204, 12
[207] Joseph PA, *Constitutional and Administrative Law in New Zealand*, above, note 10, 1036

balance to be struck would be unique to each society. As expressed by the High Court in *R v Mallison*[208]

> BORA is not a technical document. It has to be applied in our society in a realistic way. The question is whether what was done gave practical effect in the particular circumstances to the rights protected by the particular guarantee, here s. 23(1)(b). And anyone complaining of a breach of the BORA must, as the Canadian Courts say, invest the complaint with an air of reality

Therefore, rights and freedoms contained in BORA must be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[209] A limit will not be justified if it is *ad hoc* and arbitrary.[210] A limit must also be identifiable, adequately accessible, and sufficiently precise.[211]

In New Zealand, the approach adopted is the three-step test set out in the Court of Appeal in *Moonen*[212], which followed the leading Canadian Supreme Court authority *R v Oakes.*[213] The three-step test applied is

b) What is the aim of the infringing act?

c) Is it the least infringing way to achieve that aim?

d) The proportionality between the aim and right.

Before embarking on this test, the Court must first identify the scope of the relevant right or freedom. This principle has been statutorily entrenched in section one of the Canadian Charter of Rights and Freedoms[214], based on which section five of the New Zealand Bill of Rights Act 1990 was modeled. Where incursions into rights have been made, section five requires the defendant to show that the limit is "reasonable" "prescribed by law" and "demonstrably justified in a free and democratic society".[215]

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[208] *R v Mallison* [1993] 1 NZLR 529, 529 (HC)
[209] *R v Goodwin* [1993] 2 NZLR 153, 193 (CA); *R v Te Kira* [1993] 3 NZLR 257, 273 and 277 (CA)
[210] Joseph PA, *Constitutional and Administrative Law in New Zealand*, above, note 10, 1056
[211] *R v Jeffries* [1994] 1 NZLR 290, 302 (CA) per Richards J; *R v Laugalis* (1993) 10 CRNZ 350 (CA), *R v Pratt* [1994] 3 NZLR 21 (CA), and *R v Wojcik* (1993) 11 CRNZ 463 (CA)
[212] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) 16 – 17
[213] *R v Oakes* [1986] 2 DLR (4th) 200 (SCC)
[214] Constitution Act 1982 (Canada), s. 52 (1) (as enacted by the Canada Act 1982 (UK), c 11).
[215] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) See also *R v Butler* [1990] 50 CCC (3d) 97 (Man QB)

This is a fair exercise in the balance of rights, which accords with both procedural and substantive limbs of the rule of law; so long as the Judiciary *continue* to pursue a purposive approach where rights are being challenged as between the individual and the state.[216]

### *B Procedural Safeguards*

Freedom of expression in New Zealand is acknowledged by article 14 of BORA[217]. However, the lack of entrenchment of BORA means that there are no procedural safeguards set in stone before a person may be deprived of his/her freedom of expression. Section five is not a procedural safeguard as it does not prevent Parliament from enacting legislation inconsistent with BORA; furthermore, it is weak and often side-stepped by the Courts on the basis of section four.[218]

Freedom of expression in Singapore, guaranteed by article 14(1) (a)[219] of the Constitution, in theory sets up procedural safeguards by virtue of its supreme status as an entrenched Constitutional right. However, article 14(1) concurrently mandates the confiscation of an individual's freedom of expression by Parliament for the reasons set out in article 14(2) (a) to (c)[220]. Such limitations on a right are based on the accepted legal principle that rights are not absolute, but need to be balanced against the competing rights of other individuals, such as collective security, order or public health and morals.

In Singapore, the procedural requirement set out by article 14(2) (a) to (c) is the *"necessary or expedient"* test. So long as enactments are within the ambit of

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[216] *Simpson v Attorney - General (Baigent's Case)* [1994] 3 NZLR 667 (CA), "It is consistent with that affirmed right (in BORA) to interpret s.6(5) of the Crown Proceedings Act as not protecting the Crown from liability for the execution of a search warrant in bad faith."

[217] "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form"

[218] See The Laws of New Zealand (Butterworths Online) New Zealand Bill of Rights Act 1990, Part I (5) paras 51 – 66

[219] "Every citizen of Singapore has the right to freedom of speech and expression"

[220] Constitution of Singapore, s 14 (1)(a) – (c), "security of Singapore... friendly relations with other countries... public order or morality... protecting the privileges of Parliament... providing against contempt of court, defamation or incitement to any offence"

exceptions set out under the provisions of article 14 (2) (a) to (c), they are protected from invalidation.

Regardless of the legality of the above derogation clauses, the rule of law and the inalienability of fundamental liberties in a democratic society require that *greater* emphasis be placed on rights. The nature of the derogation clauses, as set out in the Singapore Constitution mean that rights-inconsistent legislation can be justified in the name of state or community interest. However, the predicate of representative government is that change should be effected through peaceful discussion rather than violent means. By carving out myriad restrictions to free speech, legislative drafters are in fact, taking a paternalistic approach, which assumes that citizens are easily incited to violence, thus undermining the dignity and autonomy of the individual; and secondly, legislative drafters have restricted peaceful dialogue, which is necessary, particularly in a political context, for the development of a democratic society.

### *C Licensing*

Licensing, as it is practiced in Singapore through the Public Entertainment and Meetings Act[221] (PEMA), is substantively unjust based on the principle that "although the state can punish an expressed opinion...no law can validly restrain the articulation of an opinion".[222] As held by the High Court in the recent case of *Chee Soon Juan v Public Prosecutor*[223]

> Article 14(2)(a) of the Constitution... clearly allowed for legislation to limit the exercise of the fundamental liberty of freedom of speech. There was no absolute right to freedom of speech in society and the enactment of the Public Entertainment and Meetings Act (PEMA) was eminently within legislature's powers

This line of judicial reasoning resembles the positivistic[224] refrain often echoed in the Singapore High Courts[225]. Further, it neglects the legal principle that

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[221] Public Entertainment and Meetings Act (PEMA) (Cap 257, 2001 Rev Ed) s 2

[222] Sir William Blackstone, *Commentaries on the Law of England* (1765 – 69) Bk 4 Cap II 151 – 152

[223] *Chee Soon Juan v Public Prosecutor* [2003] SGHC 112, 120

[224] The Positive school of thought asserts that the law is what it *'is'*, not what it *'ought to be'*, that is, law is free of the trappings of morals and principles. Major proponents of positivism include Austin, Bentham and Hans Kelsen. For a brief summary on the positivism see http://www.utm.edu/research/iep/l/legalpos.htm <last accessed 18 June 2004>

fundamental rights require stronger protection because of the imbalance of power between the individual and the state. The plaintiff in this case challenged the constitutional validity of the PEMA in infringing his right to free speech in a manner that was manifestly unfair. In application, section 19(1) (a) PEMA provides that it shall be an offence for any person to make public speeches without a license duly issued under the Act.

While the PEMA is 'law' in the sense that it was passed in a procedurally correct manner, adhering to the requirements of the Constitution, the effect of section 19(1) (a) PEMA was to deprive the plaintiff of his right to free speech without good reason.[226] The holding in *Chee Soon Juan*[227] reveals that the formal guarantee of free speech under the Constitution is not a real guarantee in practice.

A purely rule-based approach to the nature of law as that taken in *Chee Soon Juan*[228], is problematic. Natural law thinkers argue that moral standards qualifying the rules[229] are present in the law, even before the standards are articulated or decisions based upon them are announced.[230] This idea is best enunciated by Ronald Dworkin[231] who argues that principles or non-rule standards are the lifeblood of the law to which a judge is entitled to have recourse to in the interpretive process in order to uphold substantive fairness. [232]

Furthermore, the PEMA in application, is a form of prior restraint, which derogates from principle of due process, by conferring on a Minister the discretion to

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[225] For example, see *Teo Soh Lung v Minister for Home Affairs & Ors* [1989] 2 MLJ 449

[226] B Jeyaretnam v Public Prosecutor and another appeal [1989] SLR 4 (CA)

[227] *Chee Soon Juan v Public Prosecutor* [2003] SGHC 112; See http://www.singapore-window.org/sw04/040913st.htm <last accessed 15 Sep 04>

[228] *Chee Soon Juan v Public Prosecutor* [2003] SGHC 112

[229] (*e.g.* that a rule should not apply as written if it would lead to an absurd result, or if one of the parties had acted inequitably, and so on)

[230] See Simmonds NE, *Central Issues in Jurisprudence* (Sweet & Maxwell, London, 1986) 2 – 4

[231] See generally Dworkin R, *Taking Rights Seriously* (1977) University of Chicago Law Review 14

[232] Fuller also fleshes out his idea of procedural law by explaining what would constitute a violation. "When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality--when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law." Lon Fuller, "Positivism And Fidelity To Law: A Reply To Professor Hart" (1958) 71 Harv L Rev 630, 660

refuse any licence[233], for whatever conditions "as he thinks fit"[234]. In essence, a guarantee of due process is a guarantee of procedural fairness.[235] Before a person can be deprived of life, liberty, or property, certain procedures must be observed, procedures designed to ensure fairness.[236] Apart from the adherence to formal procedures in the promulgation or amendment of laws, this also includes impartiality in judging, the giving of reasons to justify the result reached, and lastly, universalism, which means like cases should be treated alike.[237]

Therefore, the licence is altogether, a potent mechanism for any government to control and regulate activities, which it considers potentially harmful to society. In spite of the constitutional guarantee to free speech, the licence deviates significantly from both substantive and formal conceptions of the rule of law. It is unconstitutional and should be struck down by the Judiciary, however, it has continues to be treated as 'law' in the sense delineated in section two of the Constitution.

### *D The Law of Defamation*

Defamation in Singapore is a constitutionally entrenched limitation on the right[238], which extends to the critique of politicians, based on the principle that honorable men would not seek office if their reputation were at stake, and it would therefore "do the public more harm than good".[239]

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[233] Section 3(a) PEMA, see note 228

[234] Section 10 PEMA, see note 228

[235] The test case for Blackstone, one suggested earlier by Coke, was whether Parliament could so violate natural justice as to make a man a judge in his own case. Coke had taken the negative. See, e.g., Dr. Bonham's Case, 8 Coke's Rep. 226, 235 (1610), *"if any act of Parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, iniquum est aliquem suae rei esse judicem"* (it is wrong for a man to be a judge in his own case); Blackstone took the affirmative, "If we could conceive it possible for the Parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or not" Blackstone, 1 *Commentaries on the Laws of England* 91 (1765)

[236] Nowak John, et al., *Constitutional Law* (2d ed, West Publishing Co, 1983) 557 ("The essential guarantee of the due process clause is that of fairness.")

[237] Blackman Rodney, *There is there there: Defending the Defenseless with Procedural Natural law,* (1995) Arizona Law Review, Supplemental Papers 9

[238] Constitution of the Republic of Singapore (1999) s 14 (2) (a)

[239] *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310,

Conversely, the New Zealand case of *Lange v Atkinson*[240], a case, which similarly deals with criticism of political figures, the High Court called for "the balancing of rights, critical to the law of defamation... to be guided by the underlying assumptions of democratic government"

The New Zealand High Court consistently looked first at the intention of the drafters with regards to the law of defamation[241], and any current reviews by Parliament, before looking at preceding judicial decisions.

Apart from the above, in engaging in the balancing exercise, the High Court appeared to be guided by five main considerations:

(a) Present social values;[242]

(b) The public interest and "chilling effect" of defamation actions;[243]s

(c) International treaties and obligations; [244]

(d) The value accorded to the rights at issue in the Bill of Rights Act[245]

(e) The approach of other jurisdictions[246], namely the United States, the United Kingdom, Canada and Australia.

The main consideration of the High Court, being the Bill of Rights Act and the guiding principle of representative democracy, which the High Court acknowledged as paramount.

Ultimately, Elias J, applying Australian case law[247], was of the view that it was for the "common convenience and welfare"[248] of New Zealand society, and in furtherance of the enhanced protection of freedom of expression[249], that the common

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[240] *Lange v Atkinson & Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC) 32 per Elias
[241] *Lange v Atkinson & Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC), 32 per Elias J
[242] *Lange v Atkinson*, above n240, 32 Elias J
[243] *Lange v Atkinson*, above n240, 37 Elias J
[244] *Lange v Atkinson*, above n240, 32 Elias J
[245] *Lange v Atkinson*, above n240, 45 – 46 Elias J
[246] *Lange v Atkinson*, above n240, 36 – 46 Elias J
[247] *Theophanous v Herald & Weekly Times Ltd* [1994] 182 CLR 105; 124 ALR 1 and *Stephans v West Australian Newspapers Ltd* [1996] CLR 211; 124 ALR 80 applied
[248] See *Baron Parke in Toogood v Spyring* (1834) 1 CM & R 181, 193 applied
[249] *Lange v Atkinson*, above n240, 34 Elias J

law defense of qualified privilege should apply to claims for damages for defamation arising out of political discussion[250].

The facts of the case in *Jeyaretnam v Lee Kwan Yew*[251], was an appeal arising out of an action by the then Prime Minister of Singapore against the appellant, the secretary-general of the Worker's Party for slander based on the words spoken by the appellant at a political rally organized by the Worker's Party on 26 August 1988 in the hustings for the General Election in 1988. The appellant accused the PAP government of not being honest, and cited instances, which he alleged were examples of them misleading the people of Singapore.[252] The respondent complained that this part of the appellant's speech contained grave slander on him.

By comparison, the subject matter of defamation in *Lange v Atkinson*[253] is materially different and of lesser gravity than the speech at issue in the Singapore Court of Appeal case. Nonetheless, for the purposes of this paper, the crucial observation to be made is the Court's approach to the Constitutional interpretation of the freedom of expression.

Unlike *Lange v Atkinson*[254], the Court of Appeal in *Jeyaretnam v Lee Kwan Yew*[255] accorded secondary importance to the values of democracy and free speech.

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[250] *Lange v Atkinson*, above n240, 46 Elias J

[251] *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310

[252] Part of the transcript thereof (quoted in *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310, 310 – 311) "It was revealed at the coroner's inquest that Teh committed suicide by taking poison. Under the Drugs Act... a register is kept of all the chemists or pharmacists that deal with this drug... My question was why hasn't the government conducted any inquiry to find out how Mr Teh came by this poison, by these drugs? Shouldn't the people be told? I said it was essential for a government to tell the truth and nothing but the whole truth and not to hide anything... Well I hope that before polling day we will be told how Mr Teh came by this poison.. But I have another question... Mr Teh wrote to the Prime Minister... a day before his death... And if my memory serves me well and I think it does, Mr Teh ended the letter by saying I am very sorry I will do as you advise. My question to the Prime Minister... is... did he respond to that letter? And if he did respond what was his response? ...Minsiters must not be allowed to escape responsibility. And Cabinet bore responsibility for the whole thing. And I said it was wrong to allow Mr Teh to get away from answering his question and so we must know how it s that he came by death. So I hope we will have answer to this question from the Prime Minister before polling day"

[253] The defendant, North and South magazine published an article lambasting the performance and leadership of the plaintiff, David Lange during his time as Prime Minister. The plaintiff claims damages for defamation.

[254] The defendant, North and South magazine published an article lambasting the performance and leadership of the plaintiff, David Lange during his time as Prime Minister. The plaintiff claims damages for defamation.

[255] *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310

Instead, the Court of Appeal looked mainly at the wording of the Constitutional provision under article 14 of the right to free speech and concluded that

> Parliament is empowered to make laws to impose on the right of free speech restriction designed to provide against defamation.

Article 162 of the Constitution, "any modification, adaptation, qualification and exception is necessary to be made to the law of defamation as to bring it into conformity with the Constitution", nonetheless, the Court held simply that by virtue of article 14(1)(a), "the law of defamation is not inconsistent under the right of free speech... and accordingly no such modification, adaptation, qualification and exception is necessary to be made thereto". The Court of Appeal affirmed that the right of free speech under article 14, is subject, *inter alia,* to the common law of defamation as modified by the Defamation Act[256].

Furthermore, in *Jeyaretnam v Le Kwan Yew*[257], the Court of Appeal referred with approval to a pre-Charter case, *Tucker v Douglas*[258], which would be of limited relevance in Canada today, which stated

> The suggestion that a public man can be slandered or libelled in his public capacity is entirely without foundation... A man's moral character is the same whether in private or public life and is in either case equally entitled to the protection of the law from the libellous attacks.

However, where the appellant cited *New York Times Co v Sullivan*[259] and *Lingens v Austria*[260] in support of the right of free speech in the face of constraints

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[256] Defamation Act (Cap 75, 1965 Ed)
[257] *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310,
[258] *Tucker v Douglas* [1950] 2 DLR 827 (Sask CA) 840, per Gordan JA; The Canadian Charter of Rights and Freedoms has been in force since 17 Apr 1982.
[259] *New York Times Co v Sullivan* [1964] 376 US 254; The rule laid down is that a person will not be liable for defamaing a public figure unless 'actual malice' is proven
[260] *Lingens v Austria* [1986] EHRR 407; In this case, the European Court of Human Rights gave determinative weight to the importance of open political debate and speech as being a core pillar of democratic society. It also noted that the impugned expression had to be assessed in its particular context: that of a post—election political controversy where the usage of verbal weapons was 'in no way unusual in the hard-fought tussles of politics.' By comparison, no such tests were applied in the Court of Appeal in *Jeyaretnam,* see note 305

imposed by defamation[261], the Court of Appeal chose, selectively to distinguish these cases on the basis that[262]

> The terms of article 14 of our Constitution differ materially from the First and Fourteenth Amendments of the Constitution of the United States and also from article 10 of the European Convention on Human Rights.

Once again, a dialogical approach is evident from the Singapore Court's selective use of foreign cases. By juxtaposition, although BORA is modeled against the Canadian Charter, the High Court in this case, chose to disregard Canadian authorities, which set out the non-application[263] of the Charter in cases between individuals. By virtue of section three of BORA, Elias J held it was the responsibility of the Judiciary to affirm and protect rights, even between individuals[264]

> The application of the Act to the common law seems to me to follow from the language of s. 3, which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian Charter

By comparing the two cases a few pertinent observations can be made. Firstly, it is evident that where the New Zealand High Court took a wide approach to according the individual the right to free speech, the Singapore Courts took a narrow approach, and giving insufficient consideration to the context of electioneering, in which the facts of the case arose.

Secondly, while both Courts deferred to the intention of the drafters, ultimately, the New Zealand High Court accorded primacy to the value of democracy, and the welfare of New Zealand society – thereby, taking a purposive approach to

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[261] "On the basis of these authorities, Mr Gray submitted that in order to give effect to article 14, the right to sue for defamation has to be curtailed, and such curtailment has been accepted in other jurisdictions. In particular, these authorities suggest that qualified or conditional privilege attaches to publications critical and defamatory of the official acts of politicians and those in public positions because it is the common interest of all citizens to have unconstrained political debate and effective democracy." *Jeyaretnam JB v. Lee Kuan Yew* [1992] 2 SLR 310

[262] *Jeyaretnam JB v. Lee Kuan Yew*, above note 260, 310, *per* LP Thean J

[263] Tushnet, M., "The Issue Of State Action/Horizontal Effect In Comparative Constitutional law" (2003) I Con 1.1(79) 3

[264] *Lange v Atkinson*, above n240, 32 Elias J

rights. Contrastingly, the Singapore Court of Appeal placed emphasis on the construction of article 14 of the Constitution, which, taken *literally,* allowed Parliament to draft exceptions to the right of free speech[265].

Thirdly, both jurisdictions place different emphasis on the value of democracy and free speech. The defense of qualified privilege, as upheld by the Court of Appeal in *Lange v Atkinson*[266], enshrines the vital importance of freedom of political speech[267] in the furtherance of democratic ideals. Furthermore, qualified privilege extends to protect the legitimate interest of the recipient to receive false information[268]; as well as being borne of the recognition that it was not always right to presume malice from the publication of false and defamatory words.

In considering substantive fairness, it must be borne in mind that the elements of 'substantive fairness' are derived from principles, which depend for their validity or importance on the particular circumstances of different societies.[269] By comparison, the Singapore Court of Appeal accorded paramountcy to public reputation at the expense of the public's right to receive such information and did not accord sufficient attention to the context of the case. From this case study, the "constitutional bargain", set out in the derogation clauses to article 14 of the Constitution, appears not to be a "balancing exercise", as that undertaken by Elias J in *Lange v Atkinson*[270], but more so, a legislative tool, which ultimately leads all constitutional calculations to the same foregone conclusion – as enunciated in the Shared Values White Paper[271], "Nation before community and society before self".

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[265] The constitutionality of the derogation clauses to article 14 of the Constitution is not at issue; many Western liberal democracies also provide for limits to rights. The issue is that the Courts chose to take a positive approach and read narrowly rights, which by virtue of democracy, should be accorded a wide ambit.

[266] *Lange v Atkinson* [2000] 3 NZLR 385

[267] *R v Keegstra* [1991] 2 WWR (SCC) 56 per Dickinson CJC

[268] *Lange v Atkinson*, above note 240, 469 – 470

[269] See Raz Joseph, *The Rule Of Law And Its Virtue* (1977) 93 LQR 195, 196; See Raz Joseph, *Law, Morality, And Society* (Clarendon Press, Oxford, 1977)

[270] *Lange v Atkinson*, above n240

[271] White Paper on Shared Values (Cmnd 1 of 1991), introduced in January 1993. However, the Shared Values lack constitutional and legal standing, "(1) Nation before community and society above self; (2) Family as the basic unit of society; (3) Community support and respect for the individual; (4) Consensus, not conflict; and (5) Racial and religious harmony"

## *E Censorship*

In Singapore, The Singapore Undesirable Publications Act[272], the Minister has discretion to "prohibit the importation, sale or circulation" of publications that are "contrary to the public interest."

Censuring is justifiable on the basis that it may harm "public morality"[273], even to the extent of paternalism. In New Zealand, the justification for censorship laws[274] is that there must be enough perceived harm or potential for harm in the material in question to outweigh the general right of freedom of expression.[275]

However, it takes a strenuous interpretation to extend censorship to religious materials, as was the case in *Colin Chan v PP.* [276] In this case, the Minister for Information and the Arts was found to have acted rationally in banning publications produced by the International Bible Studies Association (hereinafter "IBSA") – a denomination of Jehovah's Witnesses. The Court of Appeal upheld the Minister's decision by finding that Jehovah's Witnesses do not partake in warfare, which threatens the national security of Singapore. The Court additionally stated that issues of "national security are not justiciable."

The stated reason by the Courts for the threat posed by the religion to National security, *per* Yong CJ

> The Jehovah's Witnesses were perceived to be a threat to national security, in their staunch belief that Satan is the God of this world and thus refuse to salute to the flag of any nation or perform national service, that they were banned.

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[272] Undesirable Publications Act, (Cap 338) The Statutes of The Republic of Singapore (1985 rev. ed.)
[273] Constitution of the Republic of Singapore, s 14 (2) (a)
[274] The Films, Videos, and Publications Classification Act 1993, s 3 (1) – (3)
[275] *Society for the Promotion of Community Standards Inc v Waverley International (1988)* Ltd [1993] 2 NZLR 709, 727
[276] *Chan Hiang Leng Colin & Ors v. Minister for the Information and the Arts* [1996] 1 SLR 609, 639 (prosecuted under the Singapore Undesirable Publications Act, see note 278)

The Court established the nexus between the promulgation of the Jehovah's Witness faith and its threat to national security as such[277]

> It is not disputed that Jehovah's Witnesses do in fact refuse to do National Service and that this is a central tenet of their faith. It is the appellants' own case that the publications of IBSA are essential for the appellants in the profession, practice and propagation of their faith (had it been otherwise, there would be no question of article 15 being involved and the appellants would have no locus standi). It must follow, then, that these publications are essential for the profession, practice and propagation of beliefs, a central tenet of which is the refusal to do National Service. It seems to us self-evident that this by itself establishes the factual basis that issues of national security are involved here.

The High Court further promulgated that threats to national security were the prerogative of the executive, and thus precluded judicial review, in affirmation of the principle stated in the Court of Appeal case of *Chng Suan Tze*[278], and further, of the *ratio* in *Lee Mau Seng v Minister of Home Affairs*[279], (which has been constitutionally entrenched by virtue of section 8B(2) ISA) [280], that such ministerial discretion was subjective, thus judicial review should only lie with respect to issues of compliance with procedural requirements.

The ban on religious materials published by the IBSA, on the basis of national security, was affirmed in the subsequent case of *Liong Kok Keng*[281] where the High Court held that[282]

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[277] *Chan Hiang Leng Colin & Ors v. Minister for the Information and the Arts*, above note 274, 618 – 619

[278] *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69, 83, per Wee Chong Jin CJ, "It is clear that where a decision is based on considerations on national security, judicial review of that decision would be precluded."

[279] *Lee Mau Seng v Minister of Home Affairs* [1971] 2 MLJ 137

[280] Constitution of the Republic of Singapore (Amendment) Act 1989 (No 1 of 1989) which came into effect on 27 January 1989

[281] *Liong Kok Keng v Public Prosecutor* [1996] 3 SLR 263, The appellant, who was a member of the Jehovah's Witnesses, was convicted of two offences under s 4(2) of the Undesirable Publications Act (Cap 338) for having in his possession publications which were prohibited under s 3(1) of the said Act, vide Gazette Notification No 123 dated 14 January 1972 (Order 123) and Gazette Notification No 405 dated 4 February 1994 (Order 405). The Orders prohibited the importation, sale and circulation of all materials published or printed by the Watch Tower Bible and Tract Society (WTBTS) and the International Bible Student's Association (IBSA).

[282] *Liong Kok Keng v Public Prosecutor*, above note 279, 266 F - G; *Chan Hiang Leng & Ors v Minister for Information and the Arts* [1996] 1 SLR 609 followed

> Article 15(1), which enshrined the fundamental right of a person to profess, practice and propagate his religion, must be read in the light of art 15(4) which clearly envisaged that the right to freedom of religion was subject to inherent limitations and was not an absolute and unqualified right.

Importantly, the ban on all IBSA materials was a blanket ban, regardless of the content of the material. Therefore, hypothetically speaking, a generic King James Bible, published under any other publication would be permissible, but if published by the IBSA, would be banned.

In a similar case involving censuring of religious material, the Court of Appeal in *Livingword* [283] took the opposite approach, elevating the importance of freedom of expression even in the face of discrimination.[284] The Court held that a publication on "sex" was only objectionable under s 3(1) of the Films, Videos, and Publications Classification Act 1993 if it dealt with sexual activities. The purpose of the Act being to prevent the distribution of pornographic material that is injurious to the public good. Further, it was held that the Bill of Rights was a limitation on governmental, not private conduct,[285] choosing to construe a wide ambit to individual rights, even to the extent of permitting morally undesirable material.

### *F Some Observations*

It may be justifiable, as an extension of the "constitutional bargain" for limitations to be read into the right to free speech in the name of national security and public order would prohibit speech, which creates imminent violence. However, it has been opined that such limitations also restricts speech that is nowhere near creating racial riots, and in fact, the speech abridged by this rationale may have helped quell tensions[286]. For example, denying circulation of Jehova's Witness publications

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[283] *Living Word Distributors Ltd v Human Rights Action Group Inc* [2000] 3 NZLR 570 (CA).
[284] see note 98 at 592, the videos were essentially political tracts, although the emphasis was on the perceived promiscuity and irresponsible sexual behaviour of male homosexuals and the fact that they have chosen to pursue the "homosexual lifestyle".
[285] *Livingword,* above note 281, 583
[286] Goodroad Scott L, "The Challenge of Free Speech: Asian Values v Unfettered Free Speech, An Analysis of Singapore and Malaysia in the New Global Order" (1998) 9 Ind. Int'l & Comp. L. Rev. 259, 300

because they may threaten war efforts is not an imminent threat to the security of Singapore. If any threat exists, it is the spread of pacifist ideals that may challenge the apparent extreme political realism that was exemplified by the court. Even so, the blanket ban on all IBSA publications continues to exist as the law[287].

The "constitutional bargain" entails the balancing of conflicting interests in society. In a democratic society, this balance should veer towards the objective of minimizing curtailment of fundamental liberties, in favor of the individual. Conversely, where issues of national security, or public morality are at stake, the balance to be achieved, depends largely on the values embraced by society. In a utilitarian matrix, society may elevate the interest of the community over that of the individual – this too, must be accepted as a legitimate formula.

Every society will place varying emphasis on different values. For example, cases from a variety of countries examined in relation to hate speech, *Faurrison v France*,[288] *Chaplinsky v New Hampshire*,[289] *Brandenburg v Ohio*,[290] *R v Keegstra*[291] all recognize that freedom of expression has a wide ambit; nonetheless, they differ in their assessment of what will constitute a justified limitation on the right. This approach[292] is in accordance with the notion that[293]

> A constitution, in nothing more than a formal sense, is only an organisation of men and women. Its character depends upon the character of the people engaged in governing and being governed.

However, it is axiomatic that where fundamental rights and liberties are at stake, the context of the situation, the gravity of the limits placed against the freedom of the individual, and the degree of "harm" (in the context of censorship and defamation) *must* be taken into account. Furthermore, in the case of Singapore, where

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[287] http://www.singapore-window.org/80330up.htm <last accessed 17 Sep. 04>; On issues of rights in Singapore, see, generally, http://www.singapore-window.org/rights.htm <last accessed 17 Sep. 04>
[288] *Faurisson v France* (16 December 1996) Com No 550/1993, CCPR/C/58/D/550/1993 (UNHRC)
[289] *Chaplinsky v New Hampshire* [1942] 315 US 568
[290] *Brandenburg v Ohio* [1969] 395 US 444
[291] *R v Keegstra* [1991] 2 WWR 1 (SCC)
[292] The "life of the law has not been logic: it has been experience." See Holmes OW, *The Common Law* (MacMillan, London, 1882) 1
[293] Jennings Ivor, *The Law and the Constitution*, (4 ed, University of London Press, London, 1952) xv

the invocation of "national security" is made, the nexus between such allegations and the right to freedom of expression and religion must be a proximate one, which is logically and fairly established. Entrenchment, as a procedural safeguard, is lost if the Judiciary continually adopt an attitude subservient to the whims of Parliament.

While the approach taken by the New Zealand Courts is indicative of a wide, purposive approach, it is also evident that much reliance is placed on purposive interpretation, and common law defenses, rather than a direct application of BORA article fourteen. Furthermore, ultimately, rights may be legislatively overruled by "dint of section four".[294] Entrenchment is necessary, not only as a procedural safeguard, but also to encourage the common law development of the rights affirmed in BORA. It has been lamented that the lack of case law has negatively impacted the section seven reporting mechanism, by not providing sufficient guidelines for the Attorney General by which to make a rights-call on Bills.

## *VI Looking Outside an Entrenched Bill of Rights*

### *A Alternative Safeguards to Rights*

When interpreting enactments dealing with individual's rights and freedoms, the purposive approach, as applied by New Zealand Courts[295] in this manner, permits a less legalistic, more generous, rights-centred approach. Consequently, substantive fairness is achieved through purposive interpretation of a Bill of Rights.

Nonetheless, although the New Zealand Courts have carved out substantive safeguards to rights through taking a purposive reading to rights, nonetheless, these holdings, despite being law, may be prospectively overruled by legislation, "by dint of section four". Acknowledging that Constitutional supremacy is political untenable in

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[294] *Quilter v Attorney-General* [1998] 1 NZLR 513 (CA) 523

[295] "A purposive approach to the interpretation of BORA requires the identification of the particular right. The Act's guarantees are cast in broad and imprecise terms and the identification of the object of the particular right allows for the inclusion within its scope of conduct that truly comes within that purpose and, the exclusion of activity that falls outside", *MOT v Noort [1992] 3 NZLR 260;* See Hogg, "Interpreting the Charter of Rights: Generality and Justification: (1990) 28 Osgoode Hall LJ 817

a legal framework enshrining Parliamentary sovereignty, this part of the paper considers the feasibility of alternatives to strengthening the application of BORA, *without* entrenchment.

Apart from entrenchment of BORA, it is submitted that an alternative safeguard is to strengthen the interpretive function of BORA, through enhancing the operation of section five, six and seven in tandem, with an objective towards strengthening the role of the Judiciary as a check on Parliament and the Executive.

### *1. Judicial Indications of Inconsistency*

Despite the watered-down nature of BORA in its un-entrenched form, the Judiciary also possess, by way of section five of BORA, the ability to make 'judicial indications of inconsistency' where legislation unwittingly overrides the rights preserved in BORA. A robust application of section five has the potential to serve as an alternative substantive safeguard of rights, which would further complement the arguably weak section seven reporting mechanism, provided in BORA.[296]

Nonetheless, it has been lamented that presently, section five is still a weak guardian of rights.[297] Unlike section one of the (entrenched and supreme) Canadian Charter[298], on which BORA section five is modeled, where a justified limit is prescribed by *statutory* law, in New Zealand, that law will prevail, whether or not that is "reasonable" or "demonstrably justified". Therefore, the section five inquiry only has application with regards to common law rights[299], and to determine if there is in fact a legislative inconsistency for the purposes of the section seven reporting mechanism.

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[296] See generally Huscroft, "The Attorney-General, the Bill of Rights and the Public Interest" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) 133-170; and Rishworth, "Human Rights and Bill of Rights" 1996 NZ Law Review 298, 306

[297] See, generally Butler AS, "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" 2000 NZ Law Review 43

[298] Constitution Act 1982 (Canada), s 52(1) as enacted by the Canada Act 1982 (UK), c11

[299] BORA has unqualified application to common law rules, see for example, *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48 where the law of contempt of court was a justified common law limit on freedom of expression

Conversely, as argued by the Court of Appeal in *Moonen*[300] since section five was retained, notwithstanding the later addition of section four, should it not "be regarded as serving some useful purpose" in relation to statutes? While section four would make it unlawful for a court to impliedly repeal, invalidate, or decline to apply a BORA-inconsistent provision, nothing in it renders an indication, proclamation, or declaration of inconsistency unlawful. Furthermore, if judicial indications of inconsistency cannot be made then section five is a white elephant, adding nothing to the elaboration of statute law. Could Parliament, as the framers of BORA have really intended such a result?

The strengthening of the section five mechanism requires clear legislative indication to the effect that the Judiciary is empowered to make judicial indications, or daringly, *declarations* of inconsistency; failing which, in a Westminster system, the Judiciary would continue to tread gingerly. In the UK, this mandate was given to the UK through section four of the Human Rights Act.[301]

In the controversial case of *Quilter v A-G*[302], the non-application of section five by the Courts resulted in three lesbian couples being refused marriage licenses under the Marriage Act 1955. Among the judgments, Tipping J held simply that the Marriage Act prevailed "by dint of section four"[303].

Therefore, it is submitted that the strengthening of section five, armed with procedural safeguards is necessary to prevent such occurrences. It has been suggested that if the jurisdiction is adopted by the courts then affected persons should be able to apply as of right (but subject to the appropriate standing rules) for an indication of inconsistency, meaning that proceedings can be taken even though it is accepted that

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[300] *Moonen v Film and Literature Board of Review* [1999] 5 HRNZ 224, 234

[301] On the other hand, were section five to be strengthened by Parliament, there would need to be for procedural safeguards to ensure society is not held captive to the personal morals and prejudices of an unelected Judiciary; since section five, is largely an exercise requiring the Court to make value judgments that may well involve social, legal, moral, economic, administrative, ethical and other considerations, as indicated by the Court of Appeal in *Moonen,* above note 298; It has been pointed out that the sort of exercise envisaged by *Moonen* and its (political) consequences in the case of inconsistency found are too serious to permit casualness or substantial variations dependent on an individual judge's outlook and style. See Butler AS, "Judicial Indications of Inconsistency -- A New Weapon in the Bill of Rights Armoury?, above note 295, 55

[302] *Quilter v A-G* above note 292, 523

[303] *Quilter v A-G* above note 292, 540

there is no potential for the application of section six BORA, and all that is sought to be established is that a statute places an unjustified limitation on a BORA right. If it were otherwise, the impression could be created that the courts favor certain types of cases over others, a stance that is inconsistent with the BORA itself.[304]

2. *Common Law Rights*

Implied or Common Law rights, crafted by the Judiciary, serve as substantive safeguards to the menace of absolute power, and Diceyan positivism. As emphatically expressed by Cooke J in *Taylor v NZ Poultry Board*[305], "some common law rights presumably lie so deep that even Parliament could not override them". This is a judicial re-assertion of the *Bonham* principle[306] and a reclaiming of the traditional role of a judge as a bulwark between the State and the individual. The fear of Parliamentary sovereignty in this regard, is the lack of substantive safeguards against rights-encroachment, as indicated, *obiter dicta* in the Court of Appeal, *per* Cooke, McMullin and Ongley JJ[307]

> Indeed we have reservations as to the extent to which in New Zealand, even an Act of parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights

Nonetheless, at this juncture, the debate over fundamental common law rights remains "theoretical" and "extra-judicial"[308]. No Court has invalidated or dis-applied a statute for encroaching on common law rights. In *Cooper v A-G* attempts were made, unsuccessfully, to juxtapose the Magna Carta[309], and Cooke J's common law

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[304] Butler AS, "Judicial Indications of Inconsistency -- A New Weapon in the Bill of Rights Armoury?" above note 295, 56; To similar effect see Rishworth, "Human Rights and Bill of Rights" 1999 NZ Law Review 457, 469

[305] *Taylor v NZ Poultry Board* [1984] NZLR 394, 398 per Cooke J

[306] See *Dr Bonham's Case*, above note 119

[307] *NZ Drivers' Assn v NZ Road Carriers* [1982] 1 NZLR 374, 390

[308] *Cooper v A-G* [1996] 3 NZLR 480, 484

[309] Coke E, 2 Institutes of the Laws of England 50 (W. Clarke and Sons, 1809); See Holdsworth William, 1 A History of English Law 61 in Methuen & Co., A.L. Goodhart and H.G. Hanbury, eds.(7 ed. 1956) (Restatement of French Original) (1350) 25 Ed.3, st.5, c 4 ("en due manere ou proces fait sur brief original a la commune lei")

rights dicta in *Taylor*[310]. The Courts in New Zealand have consistently affirmed Parliament's sovereignty and rationalized the Magna Carta as a "rule of law" concept having "special historical status", rather than as a constitutional trump. Similarly, in *Carter v Police*[311], Gallen J pronounced, "Parliament cannot bind its successors, except in a procedural sense". Therefore, presently, this alternative course to safeguarding rights, without entrenching BORA, is too weak to be tenable.

[310] *Taylor v NZ Poultry Board* above note 303, 398 per Cooke J
[311] *Carter v Police* 29/4/99 (HC) Wellington CP 41/99, 15, per Gallen J

## VII CONCLUSION

For a Bill of Rights to have effect as a procedural safeguard against State powers, it has to be able to restrain or limit State incursions into individual rights. In New Zealand, BORA serves mainly in an educative capacity, to affirm rights and provide a guideline for legislative drafters, owing to its status as ordinary legislation. As enunciated by its Parliamentary sponsor, the problem was that the watered-down BORA was specifically intended to only provide *guiding lights* to the executive and legislature.[312] The primary thrust of BORA is not to deter official misconduct but to positively assure that rights exist.[313]

In Singapore, Part IV of the Constitution has the potential to affirm and protect rights, however, owing to the Judiciary's niggardly, positivistic approach to Constitutional interpretation, the strength of Part IV is diminished, as evidenced in cases such as *Jabar v PP*[314], where the Court of Appeal held that

> Any law, which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well

Substantively, the rule of law is the ideal of rule by an accurate public conception of individual rights.[315] Therefore, adherence to a substantive conception of the rule of law safeguards rights by requiring that the *content* of laws, capture and enforce substantive justice and moral rights.

This paper has focused on the content of rights-inconsistent legislation, rather than the content of the Bill of Rights provisions themselves. This is premised on the assumption that the greater threat to rights is State incursions to individual rights, rather than the "freezing" or fossilization of a specific formulation of rights, as

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[312] 510 NZPD 3450-51 (2nd reading); 510 NZPD 3760-61 (3rd reading)
[313] New Zealand Bill of Rights Act 1990, section five, see note 2
[314] *Jabar v PP*, above note 181, 617
[315] Dworkin R, *Law's Empire* (Cambridge, MA, 1986) 407 – 410

expressed in the White Paper,[316] *particularly* in a system of Parliamentary Supremacy (New Zealand) or a "dominant one-party Parliament" (Singapore).

Entrenchment is necessary as a procedural safeguard against rights-inconsistent legislation. While rights adjudication *may* involve "the making of political choices in a political context pervaded by moral disagreement"[317], there are situations where limitations to rights are *clearly* justifiable. In those situations, who will protect the rights of the individual, if not by the vehicle of an independent Judiciary, reading purposively from an entrenched Bill of Rights?

A Bill of Rights exists to "affirm *and* protect rights"[318], as expressly stated in the long title to BORA, which has been consistently accepted in common law.[319] A Bill of Rights *cannot* protect rights unless it possesses the legal capacity to place limits on government – therefore, BORA in its present state, is inadequate. The direct application of BORA to common law is weak[320], "by dint of section four".[321]

In its interpretive function, the strength of substantive safeguards depends largely on the approach taken by the Judiciary.[322] However, it is the threat or inevitable consequence of legislative over-ruling, which creates reluctance among the Judiciary to develop a robust rights regime. As this paper has shown, this threat has proven both endemic, and inimical to the flourishing of common law rights

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[316] *A Bill of Rights for New Zealand: A White Paper,* A.6 *Appendices to the Journal of the House of Representatives,* Wellington, 1985

[317] Ekins Richard, "Judicial Supremacy and the Rule of Law" (2003) LQR 119 (JAN) 140

[318] The long title to the Bill of Rights Act 1990, see note 2

[319] See *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440; [1990–92] 1 NZBORR 1 (CA), *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 282; (1992) 8 CRNZ 114; 1 NZBORR 97 (CA) at 268 (Cooke P) and 292 (Gault J), *R v Goodwin* [1993] 2 NZLR 153 (CA) at 168 (Cooke P), and *R v Te Kira* [1993] 3 NZLR 257 (CA) at 261 (Cooke P).

[320] McLay Geoff, "A Symposium On Defamation And Political Expression: Lange v Atkinson: Not A Case For Dancing In The Streets" (2000) NZLR 427, 432

[321] *Quilter v A-G* above note 292, 523

[322] "A written constitution is rarely ever a complete document containing all the rules for constitutional government. A central and continuing issue is: what are the additional rules, practices, or assumptions, which are necessary to give life to a constitution? These assumptions may be based on the political theory underlying a parliamentary democracy, or they may take the form of concepts expressed in the constitution, which are interpreted in the light of the country of origin or of countries that have used these expressions", SA de Smith, *Constitutional and Administrative Law,* 5th ed., edited by Harry Street and Rodney Brazier (Penguin Books, Harmondsworth, Middlesex, 1985), chap. 1; Wheare KC, *Modern Constitutions* (London: Oxford University Press, 1962), chap. 1

protections in both jurisdictions. In a more recent constitution case, the Singapore High Court[323] pronounced that

> Although the legislature may, by Act of Parliament, lawfully deprive a person of his liberty under art 9 of the Constitution, the lawful deprivation of liberty under art 9 had to adhere to the principles of natural justice and was not to be in derogation of the Constitution. In particular, such deprivation was not to be discriminatory.

Ultimately, the Court of Appeal, overturned the judgment in this case, but the important thing to note is that the Judiciary in Singapore is still empowered to challenge unconstitutional legislation[324], because of the supreme status of our Constitution. However, where a dominant one-party Parliament has the ability to constitutionally oust judicial review, as illustrated in the amendment of the Internal Security Act, subsequent to the judicial challenge in *Chng Suan Tze,* the procedural safeguard of formal entrenchment is lost. Therefore, it is submitted that in Singapore, the strength of Part IV of the Constitution is no greater than that of BORA, owing to legislative overruling, the phenomenon of 'ouster clauses' and a line of cases evincing a judicial attitude akin to literal subservience to Parliament's intent.

Conversely, purposive interpretation in New Zealand has paved the way for a robust human rights regime at common law, in spite of its status in the statutory hierarchy. Therefore, one can conclude that BORA has achieved, to its fullest extent, what it set out to achieve in its non-entrenched form – to implement in New Zealand a "rights-centered" approach. While BORA is not directly applicable to common, case law has shown consistently, that the *spirit* of BORA[325] continues to make in-roads into common law. Consequently, despite its non-entrenched form, the Judiciary has, through purposive readings, garnered all the strength of a Bill of Rights Act towards the creation of common law defenses and remedies[326] in favor of rights protection.

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[323] *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943 at 965, para 58 – 59

[324] Legislation at issue was the Prevention of Corruption Act (Cap 241, 1993 Ed) s 37

[325] *Lange v Atkinson*, above n240, 32 Elias J

[326] *Simpson v Attorney-General (Baigner's Case)* [1994] 3 NZLR 667, 706 (CA) per Gault J – Parliament expressly bound itself: see the implementation of natural justice principles under BORA for select committee procedures; see The Laws of New Zealand, (Butterworths Online) Constitutional Law (9) Human Rights and Freedoms, para 51 – 66

Lastly, contextually, the divergent political cultures in New Zealand and Singapore, respectively, have had a significant effect on the nurturing and deadening of the rights regime in each society. In Singapore, the Shared Values White Paper[327] enshrines Confucian values of deference by the individual to the collective. However, compounded by a dominant one-party government, it is then the interest of Parliament, which arbitrarily dictates the interest of the collective.

In conclusion, the realistic proposal for both New Zealand and Singapore is a paradigmatically focus shift away from the constant tug-of-war between the Judiciary and Parliament, towards the fostering of a rights regime enshrining the inalienability of the Aristotelian belief in the dignity of the individual. Procedurally, in New Zealand, presuming that entrenchment is political untenable in a system of parliamentary sovereignty, the alternative would be to strengthen BORA section six, thus allowing the Judiciary to make judicial *declarations* of inconsistency. This would encourage common law developments of BORA section five and section six, and as a corollary, strengthen the review of pre-legislative drafting[328], through an increased articulation of the rights calculation in New Zealand. Conversely, in Singapore, the problem is substantive and intractable, apart from judicial over-ruling of the adopted "purposive approach", one can only hope that someday, the development of a more representative government can slowly heal the wounds caused by the pursuit of one party's interests.

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[327] Shared Values White Paper (Cmd 21 of 1991) (Singapore National Printers) para 41, "The concept of government by honourable men 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 a limited powers as possible, and should always b e treated with suspicion unless proven otherwise"

[328] BORA section seven, "the reporting mechanism", see note 294

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## ACKNOWLEDGEMENTS

I would like to express my gratitude first and foremost, to my parents, Rachel and Jeffrey Kung for their prayers, encouragement and support; to my aunt Regina, for her patience and generosity; to my brothers Joshua, Daniel and Samuel for always being of good cheer; to my cousin Rachel, for staying home with me through those long days and nights; to Andrew, for his timely words and acts of kindness; to Rochelle, Joella and Gina for their unrelenting care and concern; to Sir Geoffrey Palmer, for being such an encouraging, patient and wise supervisor; and last but not least, to God be all the glory!