IS SINGAPORE'S CONSTITUTIONAL SUPREMACY AN ILLUSION?

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I. INTRODUCTION

The conventional wisdom is that Singapore operates under the principle of constitutional supremacy by virtue of Article 4 of the Constitution of the Republic of Singapore.[1] Unfortunately, the reality is much murkier than what the *Constitution* would like one to believe for there has been a steady stream of academic debate, since at least the 1980s, over whether constitutional supremacy actually exists in form and in substance locally. In this article, I shall explore the arguments for and against constitutional supremacy and conclude that while it does exist in theory, it is unfortunately weak in practice. This is as the capabilities of and the actions by the bodies supposedly co-equal under the *Constitution* are not really synonymous with that of a state practising constitutional supremacy.

II. WHEN DOES CONSTITUTIONAL SUPREMACY ARISE?

The core difference between parliamentary and constitutional supremacy lies in the scope of legislative power accorded to parliament. Under the former, the legislature has the unfettered right to make or undo any law whereas under the latter, the legislature's ability is fettered by the *Constitution* such that any acts of parliament inconsistent with the *Constitution* would be void.[2] A parliament is 'unfettered' if it meets Dicey's criteria for a 'sovereign parliament': (1) when parliament is free to amend all laws, fundamental or otherwise in the same manner as other laws; (2) when there is no legal distinction between constitutional and other laws; and (3) when there are no other bodies which can

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[1] (1999 Rev Ed) [*Constitution*].

[2] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Great Britain: Liberty Classics, 1982) at 3–4 [Dicey].

nullify an act of parliament.[3] As such, Dicey observed that constitutional supremacy requires the following characteristics: (1) the constitution must be written; (2) it must be rigid; and (3) acts by the legislature must be capable of invalidation if they amount to overstepping their constitutionally prescribed authority.[4]

In addition to the Diceyean factors, the constitution must also be a '*grundnorm*'[5] for it to be supreme. Similar to how a creature cannot be superior to its maker, an "instrument cannot validate itself by declaring itself valid" hence a constitution can only attain supremacy if it is authorised by a higher power.[6] For constitutions which are already at the apex of the legal order, this 'higher power' must be external to the organs created under the constitution.[7] Examples include popular acceptance via a referendum, a gift by a departing colonial overlord to its former subjects, and even a revolutionary upheaval that imposes a new legal order illegitimately.[8] As a corollary to this principle, a constitution created by a legislative act cannot give rise to constitutional supremacy for it would mean that parliament, not the constitution, is the *grundnorm*.

III. SINGAPORE'S THEORETICAL BASIS FOR CONSTITUTIONAL SUPREMACY

There is a theoretical basis for constitutional supremacy in Singapore. On the Diceyean front, the *Constitution* clearly meets the required criteria as amending the *Constitution* is legally fettered. Article 4 of the *Constitution* declares that "any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void", which is enforced by the Judiciary under Article 93.[9] Article 5 of the *Constitution* further

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[3] *Ibid* at 37–39.
[4] *Ibid* at 78–79.
[5] A J Harding, "Parliament and the Grundnorm in Singapore" (1983) 25:2 Malaya L Rev 351 at 357 [Harding].
[6] *Ibid*.
[7] H Kelsen, *General Theory of Law and State,* translated by A Wedberg (Cambridge: Harvard University Press, 1945) at 114–115.
[8] *Ibid.*
[9] *Constitution*, *supra* note 1.

stipulates that bills seeking to amend the *Constitution* must obtain the support of "not less than two-thirds of the total number of Members of Parliament (excluding nominated Members)".[10] On the matter of the *grundnorm*, some difficulties have been voiced but those views can be safely ignored for the reasons elaborated below.

Relying on the *grundnorm* theory, Andrew Harding opined that the *Constitution* cannot be supreme because it was created by an Act of Parliament, the *Republic of Singapore Independence Act, 1965*.[11] Harding theorised that when Singapore became independent, the Malaysian Parliament failed to transfer its plenary powers to the Singapore Parliament via the *Constitution and Malaysia (Singapore Amendment) Act, 1965*[12] due to drafting errors in section 5 of the *Singapore Amendment*.[13] This was as the offending section stated that the "*executive authority and legislative powers* of the Parliament of Malaysia" [emphasis added] would be "transferred so as to vest in the *Government* of Singapore" [emphasis added].[14] The problems with the phraseology are twofold: (1) Malaysia's Parliament did not have executive authority; and (2) it could not have been intended to vest executive and legislative powers in the "Government" as that customarily refers to the Executive.[15] Harding further posited that "Government" could not have referred to the legislature as otherwise the phrase "Legislature of Singapore" would have been used instead, as evidenced by the usage of the latter phrase in section 7 of the same Act.[16] According to Harding, these errors then deprived Singapore's Parliament of its required plenary powers to subsequently enact Singapore's post-independence constitution via the *RSIA*.[17] Harding thus opined that the only way the *Constitution* could have come into being via the *RSIA* is by rationalising the whole affair as a 'revolutionary situation'.[18] Under this theory, Parliament

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[10] *Ibid.*
[11] (Act 9 of 1965) [*RSIA*].
[12] (Act 53 of 1965) [*Singapore Amendment*].
[13] Harding, *supra* note 5 at 364–366.
[14] *Singapore Amendment*, *supra* note 12.
[15] Harding, *supra* note 5 at 364–366.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

assumed plenary powers on its own accord in the ensuing legal vacuum which it then used to pass the *RSIA*.[19] As a result of this, Harding concluded that the *Constitution* is not the *grundnorm* but rather "a manifestation of the *grundnorm*" that rests in parliamentary supremacy.[20]

However, Harding's theory is unsustainable as it relies on a flawed assumption that the *Constitution of the State of Singapore, 1963*[21] was no longer valid at the time the *RSIA* was passed.[22] The *1963 Constitution* was actually still valid post independence as section 7 of the *Singapore Amendment* enabled it to apply when it stated that "[a]ll present laws in force in Singapore immediately before Singapore Day shall continue to have effect"[23] such that the *1963 Constitution* "evolved into or succeeded as the constitution of the 1965 State of Singapore on Singapore Day".[24] This means that the *RSIA* was not an act of a supreme parliament creating a new constitution but rather that of an inferior parliament amending the existing constitution.[25]

Moreover, Harding's reasoning with regards to the errors in section 5 is dubious. As analysed by former Chief Justice Chan Sek Keong, the apparent incongruity of the phrases used can be easily avoided by taking a purposive interpretation of them. The former Chief Justice pointed out that the phrase "executive authority" is likely to be free standing as it is not qualified by the words "of Parliament of Malaysia to make laws" such that it should not be read as so qualified.[26] For the issue with the phrase "Government of Singapore", the former Chief Justice perceptively observed that any ambiguity would be removed should it be read purposively—it would refer to Singapore's Parliament and the Head of State respectively.[27]

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[19] *Ibid.*
[20] *Ibid.*
[21] [*1963 Constitution*].
[22] Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution" (2017) 29: Special Issue Sing Ac LJ 619 at 658 [Chan, "Basic Structure"].
[23] *Singapore Amendment*, *supra* note 12.
[24] Chan, "Basic Structure", *supra* note 22 at 655.
[25] *Ibid* at 658.
[26] *Ibid* at 650.
[27] *Ibid.*

Lastly, even if Harding's interpretation of section 5 of the *Singapore Amendment* is correct, Parliament would have still acquired the necessary plenary powers to enact the *RSIA* without the need for the 'revolutionary situation' envisaged by him. As held by the Singapore Court of Appeal in *Public Prosecutor v Taw Cheng Kong,*[28] the mere fact that section 5 of the *Singapore Amendment* failed to transfer plenary powers from the Malaysian Parliament did not leave the Singapore Parliament entirely without recourse.[29] This was as Singapore's Parliament was able to separately obtain the required plenary powers from the "political fact of Singapore's independence and sovereignty" which had "the consequences of vesting the Legislative Assembly of Singapore with plenary powers on Singapore Day".[30] Harding's proposition is thus not convincing in proving that Singapore lacks a theoretical basis to find constitutional supremacy.

IV. WEAK CONSTITUTIONAL SUPREMACY

Notwithstanding the theoretical basis for finding constitutional supremacy in Singapore, whether it actually exists in practice is another matter. The Diceyean factors must not only be met in form but also in substance. Unfortunately, it does not appear that constitutional supremacy is strongly adhered to locally. This is as the legal fetters on what laws the legislature can pass are too lenient and, the Judiciary's fear of overstepping its constitutional role has inadvertently given too much leeway to the executive and legislature to enact laws which weaken constitutional supremacy.

A. *Weak Legal Fetters*

Enforcing the text of the *Constitution* alone is insufficient to achieve constitutional supremacy in practice as the *Constitution* lacks clauses, such as an eternity clause,[31] that impose legal immutability

[28] [1998] 2 SLR(R) 489 (CA).
[29] *Ibid* at paras 29–33.
[30] *Ibid.*
[31] See Article 79(3) of the *Basic Law for the Federal Republic of Germany* in the revised version published in the Federal Law Gazette Part III, classification number 100–1, as last amended by Article 1 of the Act of 29

on its core provisions. In fact, if one looks at the text of the *Constitution*, there are no limitations whatsoever against the permissible range of amendments the legislature can make.[32] This means that in theory, any constitutional bills, including those that would 'constitutionalise' ordinary bills establishing a dictatorship, can be passed so long as the requirement for two-thirds majority support in Parliament under Article 5 is met. Such an outcome would render Article 4's supremacy clause toothless against a rogue legislature bent on effacing the *Constitution*—a threat not insignificant in Singapore where the ruling party has held on to their parliamentary supermajority since independence.

In light of the lenient constitutional text, a common law check in the form of the basic structure doctrine to limit the range of permissible amendments is thus necessary. The courts are however unwilling to adopt anything other than an emaciated form of the doctrine. At its core, the basic structure doctrine involves the "judiciary deduc[ing] certain core characteristics of the constitutional order from the text, underlying philosophy, and history, and declar[ing] these to be unamendable".[33] There are two flavours to the doctrine based on how rigorously it is applied, the 'thick' version in *Kesavananda Bharati v State of Kerala*[34] which allows courts to invalidate amendments should any constitutional values[35] be undermined, and the 'thin' version espoused in *Mohammad Faizal bin Sabtu v Public Prosecutor*[36] which only allows for invalidation if the amendment derogates from Westminster-style separation of powers.[37] The former has yet to be endorsed locally and it is nebulous whether the

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September 2020 (Federal Law Gazette I p 2048): "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Arts 1 and 20 shall be inadmissible".

[32] The requirements for a valid amendment to the *Constitution* are found in Article 5.

[33] Jaclyn L Neo, "Towards a "Thin" Basic Structure Doctrine in Singapore (I-CONnect Column)" (17 January 2018), *I-CONnect: Blog of the International Journal of Constitutional Law*, online: <http://www.iconnectblog.com/2018/01/towards-a-thin-basic-structure-doctrine-in-singapore-i-connect-column/>.

[34] AIR 1973 SC 1461 per Sikri CJ's judgment.

[35] These values are normally abstract ideals drawn from a constitution's preamble.

[36] [2012] SGHC 163.

[37] *Ibid* at para 11.

latter applies as all mentions of thin doctrine have only been in *obiter* and were draped in an abundance of caution.[38]

Even if the thin version applied, it would be of questionable efficacy. Firstly, it does not police the relationship between the government and its citizens as it only deals with "how political power is organised and divided between the organs of State in a particular society".[39] This is problematic because a constitution at its core is a 'social contract' between the governors and the governed that sets out the rights and liabilities each party owes to the other. If this 'contractual' relationship is incapable of enforcement, then the constitution's *raison d'être* is undermined.

Secondly, the thin version does not appear very effective at preserving 'Westminster-style' separation of powers. A core tenet of the Westminster system is that every citizen must have a right to representation in parliament—a constituency cannot be denied an elected representative.[40] However, the thin version allows a denial of representation, as demonstrated by the court's *obiter dicta* in *Wong Souk Yee* which dispensed with the need to hold a by-election to fill up any post-election vacancies arising in a Group Representation Constituency ("GRC"):

> Even if the right to representation forms part of the basic structure of the Constitution, it does not follow that there is a particular *form* of representation that is "fundamental and essential" to the Westminster model of government such that it cannot be departed from. In our judgment, there is nothing in principle that would prevent Parliament from devising the GRC scheme in such a way that *a GRC could be left to be represented by less than its full complement of Members* where one or more of them has vacated his or her seat. It is therefore unnecessary to consider the existence and scope of the basic structure doctrine for the purpose of disposing of this appeal.[41] [emphasis added]

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[38] See *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 (HC) at paras 65–66 and *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 (CA) at paras 77–78 [*Wong Souk Yee*].

[39] *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA) at para 71.

[40] *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 (CA) at para 79.

[41] *Ibid* at para 78.

Although the court explained it in terms of the '*form of representation*' which suggests that having complete or incomplete representation is just a variation on the Westminster system, this is fallacious thinking. Fundamentally, the right to representation is a binary question: one either has representation or he does not. As such, only variations as to the *quality* of representation can count as variations to the Westminster system. In *Wong Souk Yee* however, the issue was not with the quality of representation, which the learned judge seemed to have implied by using the 'complete or incomplete representation' comparison, but rather the total *absence* of representation *vis-à-vis* the fifth parliamentary seat. In short, the voters were denied a voice separate from the other members due to the vacant seat. This analysis is possible because GRC members do not all act as one Member of Parliament serving the constituency. If it was converse, then *Wong Souk Yee*'s reasoning would have been sustainable for the seat would have remained completely filled until all members vacated. Seen in this light, the Westminster system was in fact derogated when the voters were denied a by-election to replace their missing Member of Parliament. The thin doctrine thus failed its purpose of protecting the Westminster system.

B. *Excessive Judicial Deference to the Legislature and Executive*

The prevailing philosophy of the courts, born out of the fear of judicial overreach, is unfortunately too deferential to the legislature and executive for them to serve as the enforcer of constitutional supremacy. According to the Diceyean characterisation of constitutional supremacy, the legislative, executive and judicial branches are co-equal under the constitution with the duty entrusted to the judicial branch to ensure that all organs of state adhere to their constitutionally demarcated roles.[42] In discharging this sacred role, it is regrettable that the local courts adopt a 'green light' approach.[43] Under this philosophy, the judiciary is not "the first line of defence against administrative abuses of power:

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[42] Dicey, *supra* note 2 at 40.

[43] Chan Sek Keong, "Judicial Review—From Angst To Empathy, A Lecture to Singapore Management University Second Year Law Students" (2010) 22: Sing Ac LJ 469 at para 29.

instead, control can and should come internally from Parliament and the Executive itself".[44] In short, the judiciary prefers the government to practice '*ownself check ownself*' and would seek to trust the government's judgment as much as possible.[45] While there may be perfectly legitimate, compelling socio-political reasons for the court to adopt this lenient approach, it comes at the expense of constitutional supremacy by emaciating the judiciary's checking power.

Perhaps the most vivid example of the damage wrought to constitutional supremacy is the fact that clauses which oust judicial review of legislative or executive acts can be valid. This occurred in the watershed case of *Teo Soh Lung v Minister for Home Affairs*[46] which affirmed the constitutionality of the amendments to Article 149 of the *Constitution* that ousted the court's judicial review powers over cases relating to subversion or national security under the *Internal Security Act*.[47] In coming to their decision, the court displayed their 'green light' preferences by deferring to the decision of Parliament to leave it "to the Cabinet and the President acting in accordance with the advice of the Cabinet to determine whether it is necessary in the interests of national security to detain a person"[48] under the *ISA*. Such an approach threatens the foundations of constitutional supremacy by allowing a supposedly co-equal body to be 'more equal' than the rest.

Even though there has been some rhetorical flourish of late decrying ouster clauses, the fact remains that the courts are still very hesitant to invalidate them. In *Nagaenthran a/l K Dharmalingam v Public Prosecutor,*[49] the defendant claimed that section 33B(4) of the *Misuse of Drugs Act* (reproduced below) is an unconstitutional ouster clause because it blocks the court from reviewing whether the Public Prosecutor's determination was valid.[50]

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[44] *Ibid.*
[45] *Ibid* at para 37.
[46] [1989] 1 SLR(R) 461 (CA) at paras 15–16 [*Teo Soh Lung*].
[47] (Cap 143, 1985 Rev Ed) [*ISA*].
[48] *Teo Soh Lung*, *supra* note 46 at para 19.
[49] [2019] SGCA 37 [*Nagaenthran*].
[50] (Cap 185, 2008 Rev Ed) [*MDA*].

> Section 33B(4) of the *MDA*: "The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities *shall be at the sole discretion* of the Public Prosecutor and *no action or proceeding shall lie against the Public Prosecutor in relation to any such determination* unless it is proved to the court that the determination was done in bad faith or with malice." [emphasis added]

The court, in a radical departure from *Teo Soh Lung*, opined that an ouster clause would be "constitutionally suspect for being in violation of Article 93 of the Singapore Constitution as well as the principle of the separation of powers".[51] However, the actual impact of that statement remains highly unclear as the court continued to approach the case in a conservative, 'green light' way by taking a very narrow view of what counts as an ouster clause. This was as the court, after incanting the famous phrase from *Chng Suan Tze v Minister for Home Affairs*[52] that "[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power",[53] found that section 33B(4) of the *MDA* was not intended by Parliament to be an ouster clause but rather only an immunity clause, which is constitutional.[54] Chief Justice Sundaresh Menon explained that the clause's purpose is not to "exclude the jurisdiction of the courts to supervise the legality of the [Public Prosecutor]'s determination under [section] 33B(2)(b) of the *MDA*" but rather only to "immunise the [Public Prosecutor] from suit save on the stated grounds".[55]

With due respect to the learned Chief Justice, it is surprising that the clause in *Nagaenthran* is not an ouster clause because section 33B(4) of the *MDA* appears to be on all fours with the ouster clause in section 8B(2) of the *ISA*. Section 33B(4) of the *MDA* also prevents the court from reviewing the validity of the decision maker's determination save on some exceptions (bad faith and malice in this

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[51] *Nagaenthran*, *supra* note 49 at para 74.
[52] [1988] 2 SLR(R) 525 (CA).
[53] *Nagaenthran*, *supra* note 49 at para 73.
[54] *Ibid* at para 74.
[55] *Ibid* at para 51.

case). While this was something the Chief Justice noticed when he observed that "Parliament intended the inquiry under [section] 33B(2)(*b*) to be determined solely by the [Public Prosecutor] and not by the court",[56] he ultimately found that both clauses were distinguishable. The core thrust of the Chief Justice's argument appears to be that there was no ouster of the court's jurisdiction over how the Public Prosecutor made his determination because the court would not have adjudicated on it anyway.[57] This was as the Chief Justice, concurring with Parliament, treated the determination's validity as non-justiciable for being something the judiciary could not have competently adjudicated on due to a lack of specialist knowledge on the matter.[58] There is however a logical deficiency in this argument: finding that one would not have adjudicated on a case, even if given a choice, is not equivalent to not stripping away one's right to adjudicate on the case. The former is a voluntary choice by the Judiciary to abstain from making a judgment while the latter is an involuntary ouster of the court's discretion to judge by Parliament. The clause in *Nagaenthran* should thus be interpreted similarly as *Teo Soh Lung*'s—one that ousts judicial review. Alas, it would appear that the 'green light' approach still holds much sway over the judiciary.

V. CONCLUSION

While constitutional supremacy has firm theoretical roots in the soil of our legal landscape, it unfortunately does not have much of a trunk on the surface. I express no judgment on whether this legal deficiency is a positive or negative one for our nation. It is a complex issue with strong arguments on both sides. Hardnosed pragmatism should trump rigid legal dogma, but at the same time, loosening the guardrails might invite trouble should the winds of authoritarianism blow in our direction. The purpose of this article is not to opine on what we should strive for but rather just to raise awareness of how weak constitutional supremacy is in Singapore.

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[56] *Ibid* at para 67.
[57] *Ibid* at paras 67–74.
[58] *Ibid* at paras 66–67.