

## Plenary Session II

### **Reception and Resistance: Globalisation, International Law and the Singapore Constitution**

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#### ABSTRACT

*The increasing permeability of the domestic legal order to international regulatory regimes has given rise to what some call the “internationalisation of constitutional law.” This presupposes that there are different layers of governance ranging from the local and global levels in such fields as market integration and human rights protection and a gradual convergence between international and constitutional law in this respect. International law may influence the constitutional landscape where legislation or institutions are modelled after international standards, and where rights adjudication is impacted by treaty, customary international law or even soft law. This paper examines Singapore practice, with a focus on human rights law and constitutional adjudication, and how international law, which as a source of collective standards may harmonise the laws of nations, has influenced domestic constitutional law. In particular, it notes that while international best practices may receive a warm reception in the field of commercial law, more resistance has been encountered in relation to public law, where legal culture influences the shaping of an autochthonous constitutional order. For example, while Singapore courts do engage with foreign decisions, they have rejected rights-expansive cases contrary to their protection of communitarian values. While treaties must be incorporated to have municipal legal effect, the*

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*Singapore courts have affirmed that if the customary international legal status of a norm is established, it automatically applies in the domestic context, although the predominant view is that municipal law enjoys legal priority.*

**Keywords:** *Human Rights, Constitutional Adjudication, International and Municipal Law*

2009]	Reception and Resistance: Globalisation, International Law and the Singapore Constitution	337
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## CONTENTS

I.	ANOTHER LAYER OF EXTRA-TERRITORIAL GOVERNANCE— TRANSNATIONAL CHECKS AND BALANCES? .....	338
II.	A PRELIMINARY ORIENTATION: FRAMING AND CONTEXTUALISING THE ENQUIRY .....	339
	A. <i>Selectivity in Subject Matter Receptivity: Field of Activity and Legal Culture</i> .....	339
	B. <i>International Human Rights Standards and the Globalisation of Constitutional Law Centripetal Force of the International Community and ASEAN Bodies?</i> .....	341
III.	SINGAPORE PRACTICE: THE CONSTITUTION AND INTERNATIONAL LAW .....	348
	A. <i>The Singapore Constitution's Silence About International Law</i> ....	348
	B. <i>Political Branches: Implementing Legislation and the Presumption of Sufficiency and Consistency of Domestic Law vis-à-vis International Norms</i> .....	350
	1. <i>Dualism and Implementing Treaty Obligations</i> .....	350
	2. <i>Reservations and Supremacy of Domestic Law</i> .....	353
	3. <i>Soft Implementation of International Standards</i> .....	354
	4. <i>External Oversight, State Sovereignty and Resistance</i> .....	354
	5. <i>Domestic Oversight</i> .....	356
	C. <i>The Courts and International Law</i> .....	358
	1. <i>Foreign Affairs and Non-Justiciability</i> .....	358
	2. <i>International Law as Source of Constitutional Law</i> .....	361
	D. <i>Human Rights Law and Constitutional Adjudication</i> .....	361
	1. <i>Standing</i> .....	363
	2. <i>Expansive vs. Restrictive Interpretation of Rights Guarantees</i> .....	363
	3. <i>Range of Justiciable Rights</i> .....	364
	4. <i>Parliament and Courts—Judicial Deference</i> .....	364
IV.	CONCLUSION .....	376
	REFERENCES .....	377

I. ANOTHER LAYER OF EXTRA-TERRITORIAL GOVERNANCE—  
TRANSNATIONAL CHECKS AND BALANCES?

The contemporary reach of international law is not confined to affairs external to the Westphalian state,<sup>1</sup> which, in an age of globalisation, is susceptible to layers of extra-territorial governance in the form of international norms and external regulatory mechanisms. What formerly fell within the purview of “domestic jurisdiction” has contracted in matters relating to civil liberties/human rights, environmental protection, economic activities and national security. International law is not exclusively inter-state law or the law of international organisations, but affects individuals and peoples groups.

The increasing permeability of the domestic legal order to international regulatory regimes has given rise to what some call the “internationalisation of constitutional law,” prompting European scholars like Cottier and Hertig<sup>2</sup> to propound a new theory of 21<sup>st</sup> Century Constitutionalism. This transcends national borders, envisaging constitutionalism “as a process, extending constitutional structures to fora and layers of governance other than nations.”<sup>3</sup> They envisage “different layers of governance from local to global levels” in such fields as human rights protection and market access in an era of enhanced international interdependence and integration.

The observation that constitutional law is “becoming more international” with the “gradual process of convergence between international and constitutional law”<sup>4</sup> presupposes both a high degree of formalisation of regional institutions vested with substantial decision-making powers delegated to them by states and able to play a check and balancing function in curtailing nation-state sovereignty. There are two gateways for the entry of international law in influencing the constitutional landscape, both in terms of adopting legislation or institutions to conform with international standards or best practices, and in relation to shaping approaches towards interpreting fundamental rights. The first relates to the political branches of government (Parliament and the Cabinet), especially those charged with foreign affairs powers, and the second, the attitude of courts towards the relevance and persuasiveness of human rights-based

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1. Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447-71 (1993); Georges Abi-Saab, *Whither the International Community*, 9 EUR. J. INT'L L. 248-65 (1998).

2. Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N.L. 261 (2003). See also TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES (Nicholas Tsagourias ed., 2007); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89 (2008).

3. Cottier & Hertig, *supra* note 2, at 264.

4. *Id.*

arguments, drawing from treaty, customary international law (CIL) or even “soft” international law norms, as part of the interpretive matrix for construing fundamental liberties.

This paper examines Singapore practice and how international law, which as a source of collective standards may harmonise the laws of nations, has influenced domestic constitutional law.

## II. A PRELIMINARY ORIENTATION: FRAMING AND CONTEXTUALISING THE ENQUIRY

Whether a state demonstrates nationalist resistance or an internationalist receptivity towards international law turns on a number of factors and raises a number of constitutional issues, including the application of the separation of powers doctrine and the role of judicial review in limiting executive power.

Relevant factors will include the juridical status of an international norm within the municipal context, how it is received (which may differ depending on the “source” of international law), its status in the domestic legal hierarchy, the subject-matter it regulates and how national interests are prioritised. Further, whether there is a certain muscularity in the domestic enforcement of international norms depends on which implementation technique the government adopts; in the field of human rights, much turns on whether the legal culture manifests a “rights consciousness” in the sense that there is active public law litigation to vindicate rights abuses.

Two preliminary points are worth mentioning, to more fully apprehend the nature of the relationship between international law and the Singapore constitutional order.

### A. *Selectivity in Subject Matter Receptivity: Field of Activity and Legal Culture*

While Singapore is actively engaged in international trade and solicitous of foreign investment<sup>5</sup> and thereby reliant on a rules-based international legal order, this does not mean that all international legal norms are uniformly received within the constitutional order. A key preliminary point to grasp is that the government’s reception or resistance towards international law turns upon the particular activity subject to international

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5. There are no constitutional rules in Singapore relation to powers of expropriation which might serve as a deterrent to foreign investment. Property rights are protected under private law and enforced by independent courts. For a discussion on the connection of market processes, globalization and constitutional rights, see David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008).

regulation. Much also depends on the substance of the norm itself: a state like Singapore may seek to harmonise its domestic laws with best global practices in the field of commercial law, while insisting on the development of an autochthonous public law.<sup>6</sup>

Legal culture influences methods of constitutional interpretation such that “global” human rights norms might clash with “local” or even constitutional values. A free market internationalist norm might for example clash with protectionist measures predicated on constitutional values such as the permanent sovereignty over natural resources. Liberal individualist interpretations of rights may clash with cultural particularities or “Asian values,” which shape the scope of rights protection, usually subordinating individual rights to communitarian goods. Indeed, it is in the area of rights and understandings of public morality that a divergence, rather than convergence, of fundamental values is evident.<sup>7</sup>

Legal culture and a preference for informal methods of dispute resolution may also determine the measures which a state may or may not adopt to implement and give effect to treaty obligations which will influence the extent to which international norms can shape local ones. Other factors like the lack of a rights culture, may inhibit the transformative role international norms might have in constitutional and political discourse.<sup>8</sup>

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6. Indeed, the Practice Statement (Judicial Precedent) noted that as the Privy Council was no longer Singapore’s apex court in the judicial hierarchy, its judgments were no longer binding on the permanent Court of Appeal. Nonetheless the power to depart from precedent would be “exercised sparingly” given “the danger of retrospectively disturbing contractual, proprietary and other legal rights.” Nonetheless, the statement also recognised “that the political, social and economic circumstances of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the fundamental values of Singapore society.” 2 SLR 689 (1994) (Sing.). In the context of public law decisions, reticence was expressed towards English decisions given the increasing influence of the European Court of Human Rights jurisprudence on English public law. See generally MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (1997). The government had also expressed its concern over the unsuitability of British decisions over matters of defence and security, given the divergent socio-political economic conditions of Singapore and the UK, and the unfamiliarity of UK judges with Singapore’s peculiar circumstances. S. Jayakumar, SINGAPORE PARLIAMENTARY DEBATES, cols. 417-73 (Jan. 25, 1989). On the dichotomous approach towards law in commercial (trend towards harmonisation and espousing legal rationality) and non-commercial fields (trend towards particularism and the cultural conditioning of the law), see Eugene Kheng-Boon Tan, *Law and Values in Governance: The Singapore Way*, 30 H.K.L.J. 91 (2000) (H.K.).

7. Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT’L & COMP. L.Q. 35 (2002).

8. See generally Li-ann Thio, *Taking Rights Seriously? Singapore and Human Rights Law*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN COUNTRIES, FRANCE AND THE USA 158 (Randy Preenboom, Albert Chen & Carole Petersen eds., 2006).

B. *International Human Rights Standards and the Globalisation of Constitutional Law Centripetal Force of the International Community and ASEAN Bodies?*

A second preliminary point is that scholars who point towards the global convergence of values in interpreting constitutional rights against human rights standards tend to be influenced by the harmonising force of international or regional systems with adjudicatory or quasi-adjudicatory mechanisms. For example, the Council of Europe and the European Court of Human Rights or various United Nations (UN) human rights oversight bodies, which facilitates the enforcement of international or regional norms in domestic settings. To what extent have international or regional organisations like the World Trade Organisation (WTO) or the Human Rights Committee which oversees the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup> added “a new layer of constitutional checks and balances so as to constrain the power of the sovereign states?”<sup>10</sup>

Tushnet<sup>11</sup> identifies four “top-down” processes which forms the focal point for scholarship on the globalisation of constitutional law and the convergence of constitutional systems in how fundamental human rights are protected. The first resides in the *cross-national interaction of constitutional judges* and how this nurtures reciprocal influences, for example, in formulating proportionality-based approaches towards constitutional adjudication.<sup>12</sup>

It is worth noting that Singapore courts do actively engage with foreign constitutional decisions but have frequently rejected rights-expansive cases at odds with its communitarian approach<sup>13</sup> towards constitutional interpretation which treats rights as defeasible interests rather than Dworkinian “trumps” and assigns greater weightage to public goods. Transnational judicial conversations are just as much about rejecting foreign decisions, which can only be legally persuasive, as adopting them. For example, in rejecting “the more recent English decisions” relating to public order and the freedom of public assembly, Justice Rajah noted these exerted

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9. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

10. Cottier & Hertig, *supra* note 2, at 268.

11. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L. L. 985, 988-90 (2009).

12. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65 (2004); Christopher McCrudden, *Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000) (U.K.); Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006).

13. Li-ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2006).

“neither persuasive nor logical force” since they “reflect and apply legal and political considerations” inapplicable to Singapore, nothing that “the infiltration of European law into English law has significantly reshaped English legal contours in this particular area.”<sup>14</sup> In particular, he rejected proportionality as a ground for judicial review as this was “a continental European jurisprudential concept imported into English law by virtue of the UK’s treaty obligations” and not “part of the common law in relation to the judicial review”<sup>15</sup> of legislative and administrative powers. A chief feature altering judicial attitudes was the influence of the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights (ECtHR), which have accorded more weight to the liberty interest.<sup>16</sup> This is clearly considered judicially unsuitable to the Singapore context and may be seen as the judicial endorsement of “Asian values” such as “Nation before community and society above self.”<sup>17</sup>

The second top-down process relates to *the work of Non-Government Organisations* with a transnational reach, insofar as they intervene in domestic public law disputes by articulating “universalist understandings of human rights.”<sup>18</sup> However, in the Singapore context, the government delivers strong and detailed rebuttal against the criticism of foreign human rights NGOs, such as Amnesty International’s campaign to abolish the death penalty<sup>19</sup> and Human Rights Watch (Maid to Order).<sup>20</sup> NGOs have sat as observers in judicial proceedings but not as participants. In fact, a fundamental principle of governance articulated by the People’s Action Party

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14. Chee v. Minister for Home Affairs, [2006] 1 SLR 582, para. 5.

15. *Id.* para. 87.

16. See AG v. Wain, [1991] SLR 383, para. 30. Sinnathuray J. noted that the English common law of contempt of court had been modified by the 1981 Contempt of Court Act “in a liberal direction” and further that English Courts were now bound by European Court of Human Rights decisions. He declared that the Singapore law of contempt was derived from the English law of contempt before the making of “major changes” by statute, to conform the law with European Convention of Human Rights Standards.

17. SINGAPORE PARLIAMENT, SHARED VALUES WHITE PAPER, Cmd. 1 of 1991 (1991).

18. Tushnet, *supra* note 11, at 989 (2009).

19. AMNESTY INTERNATIONAL, PUBLIC STATEMENT, SINGAPORE: EXECUTIONS SINCE DECEMBER DEFY GLOBAL TREND (Jan. 13, 2009), <http://www.amnesty.org/en/library/info/ASA36/002/2009> (last visited Oct. 25, 2009); AMNESTY INTERNATIONAL, SINGAPORE: THE DEATH PENALTY: A HIDDEN TOLL OF EXECUTIONS (Jan. 15, 2004), <http://www.amnesty.org/en/library/info/ASA36/001/2004>; Singapore Government, The Singapore Government’s Response to Amnesty International’s Report “Singapore—The Death Penalty: A Hidden Toll of Executions”, [http://www.mha.gov.sg/basic\\_content.aspx?pageid=74](http://www.mha.gov.sg/basic_content.aspx?pageid=74) (last visited Oct. 25, 2009); HUMAN RIGHTS WATCH, MAID TO ORDER: ENDING ABUSES AGAINST MIGRANT DOMESTIC WORKERS IN SINGAPORE, <http://www.hrw.org/en/reports/2005/12/06/maid-order-0> (last visited Oct. 25, 2009); Ministry of Manpower (Sing.), MOM’s response to Human Rights Watch Report, [http://www.mom.gov.sg/publish/momportal/en/press\\_room/press\\_releases/2005/20051206\\_MOMresponsetoHRWreport.html](http://www.mom.gov.sg/publish/momportal/en/press_room/press_releases/2005/20051206_MOMresponsetoHRWreport.html) (last visited Oct. 25, 2009).

20. HUMAN RIGHTS WATCH, *supra* note 19; MINISTRY OF MANPOWER, *supra* note 19. See generally Li-ann Thio, *Pragmatism and Realism Do Not Mean Abdication: A Critical Inquiry into Singapore’s Engagement with International Human Rights Law*, 8 SING. Y.B. INT’L L. 41 (2004).



(PAP) government is that “we will not allow foreigners to interfere in our domestic politics.” While foreigners can share their views on accessible sites like the Internet, they were not citizens who alone could “take part directly in the politics of Singapore” as only Singaporeans had “the sovereign right to determine what kind of society they want Singapore to be.”<sup>21</sup> This might be considered a facet of “soft constitutional law” which I have described as “a set of precepts embodied in a text lacking legal status, but which exerts some degree of legal impact and influence in shaping state-society relations.” Ministerial pronouncement in a dominant party state carry a quasi-law weight and shape expectations of how constitutional actors will act.

The third relates to *the work of transnational treaty bodies* with judicial or quasi-judicial oversight powers over human rights contained in treaties states have become party to. These may affect domestic constitutional law insofar as their decisions are binding as a matter of law (e.g. ECtHR decisions as mechanisms of convergence, though qualified by the margin of appreciation doctrine), or otherwise exert political pressure within states which seek to implement their international obligations in good faith.

A key focal point in assessing the intersection of international law and domestic constitutions from this perspective is to consider which human rights treaties a state has acceded to, the reservations attached to these, and whether and what measures of implementation have been undertaken to give treaty obligations municipal effect. In addition, does a state accept strong external supervision or shy from this? Do international human rights for example affect constitutional interpretation or the adoption of institutional structures?<sup>22</sup>

The observations of those who propound a 21<sup>st</sup> Century constitutionalism to take into account the governance provided by strong regional bodies, as in Europe, would appear out of joint with various Asian contexts, including Singapore. This is because Asian regional organisations, such as the Association of South-East Asian Nations (ASEAN) are more informally structured, serving more as interactive arenas than international actors, despite the recent shift towards formalisation through the adoption of the 2007 ASEAN Charter.<sup>23</sup> This Charter marks the inaugural incorporation of “human rights” expressly as a facet of the ASEAN institutional agenda,<sup>24</sup>

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21. Deputy Prime Minister Wong Kan Seng, 84 SING. PARLIAMENT REP., Feb. 28, 2008.

22. Tushnet identifies the creation of the new United Kingdom Supreme Court as being influenced by ECHR decisions on judicial structures and fair procedure. Tushnet, *supra* note 11, at 990 (citing *McGonnell v. United Kingdom*, 2000-II Eur. Ct. H.R. 107).

23. Text of the ASEAN Charter, available at <http://www.aseansec.org/21069.pdf>. See Li-ann Thio, *Human Rights and the Charter of ASEAN*, 13 ASIAN Y.B. INT'L L. 285 (2007).

24. See generally Li-ann Thio, *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep*, 2 YALE HUM. RTS. & DEV. L.J. 1 (1999).

as a principle and purpose of the sub-regional organisation,<sup>25</sup> with Article 14 promising that “ASEAN shall establish an ASEAN human rights body.” ASEAN has adopted an “evolutionary”<sup>26</sup> approach towards the creation of this body which is to be named the ASEAN Intergovernmental Commission on Human Rights whose terms of reference<sup>27</sup> were agreed upon during the 42<sup>nd</sup> ASEAN Ministerial Meeting in July 2009.<sup>28</sup> These will be reviewed after 5 years.

This primarily “consultative”<sup>29</sup> body whose *modus operandi* is to be “constructive and non-confrontational”<sup>30</sup> lacks investigative and punitive powers, which is unsurprising given that states bear the “primary responsibility” to promote and protect human rights.<sup>31</sup> This has already been criticised as “toothless” ahead of its anticipated launch in October 2009 at the 15<sup>th</sup> ASEAN Summit. Owing to a lack of strong supervisory or implementation powers, it is unlikely to exert in the short to medium term a centripetal force in harmonising the human rights practices of its constituent members to international human rights standards “as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action and international human rights instruments to which ASEAN Member states are parties.”<sup>32</sup>

The fourth top-down process relates to the demands by sending countries that their nationals, living and working as foreign workers abroad, receive fundamental rights and fair treatment.<sup>33</sup> It is interesting that within the ASEAN context, only sending countries like the Philippines are parties to

25. See arts. 1(7), 2(2)(i) but also the affirmation of the principle of “non-interference in the internal affairs of ASEAN Member States” and the right of member states to lead its national existence “free from external interference, subversion and coercion” in arts. 2(2)(e) and (f). Charter of the Association of Southeast Asian Nations, arts. 1(7), 2(2), (e), (f), (i), Nov. 20, 2007.

26. Para. 2.5. Terms of Reference of ASEAN Intergovernmental Commission on Human Rights provides for the “Adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN.” ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS, TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS, para. 2.5, <http://www.aseansec.org/DOC-TOR-AHRB.pdf>.

27. Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, *available at* <http://www.asean.org/DOC-TOR-AHRB.pdf>.

28. Press Release, Joint Communiqué of the 42<sup>nd</sup> ASEAN Foreign Ministers Meeting, Acting Together to Cope with Global Challenges, (July 20, 2009), para. 8, [http://www.14thaseansummit.org/pdf-AMM/24Joint\\_Communique\\_42\\_AMM\\_FINAL.pdf](http://www.14thaseansummit.org/pdf-AMM/24Joint_Communique_42_AMM_FINAL.pdf) (last visited Oct. 26 2009); Ary Hermawan: Govt defends decision to approve toothless rights body, <http://www.thejakartapost.com/news/2009/07/31/govt-defends-decision-approve-toothless-rights-body.html> (last visited Oct. 26 2009).

29. *Supra* note 26, para. 3.

30. *Id.* para. 2.4.

31. *Id.* para. 2.3.

32. *Id.* para. 1.6.

33. Cheah Wuiling, *Migrant Workers as Citizens Within the ASEAN Landscape: International Law and the Singapore Experiment*, 8 CHINESE J. INT’L L. 205 (2009). See also DANIEL A. BELL, *Justice for Migrant Workers: The Case of Migrant Domestic Workers in East Asia*, in BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT 281 (2006).

the UN Convention on Migrant Workers.<sup>34</sup> ASEAN in 2007 adopted the *Declaration on the Protection and Promotion of the Rights of Migrant Workers*<sup>35</sup> which recalls the Universal Declaration on Human Rights (UDHR)<sup>36</sup> in its preamble as well as the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC); this exhorts but does not legally require member receiving and sending states to “take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies.”<sup>37</sup> That is, it enumerates state duties, e.g., to promote decent living and working conditions, rather than workers’ rights. It sets out more detailed obligations, including facilitating access to justice and social welfare, ensuring fair payment and decent working conditions as well as to establish legal regulations in the recruitment of migrant workers. It charges the ASEAN Secretary-General to submit an annual progress report at the ASEAN Ministerial meeting, which relevant ASEAN bodies are to follow-up by developing an ASEAN instrument on promoting and protecting the rights of migrant workers.<sup>38</sup> The reporting function is the weakest form of external oversight; no provision is made for inter-state complaints or direct petitions from affected groups. Thus, ASEAN states are expected in good faith to implement these obligations by legislation and programmes, but are only held to account by a reporting function and peer review.

For example, Singapore has not adopted express labour legislation to regulate migrant worker issues, particularly, the situation of foreign domestic workers (FDWs). While “profits and greed cannot be allowed to override basic decency,”<sup>39</sup> the government has adopted a piecemeal approach to address cases of unlawful and abusive work practices, in the face of increased organisation<sup>40</sup> and lobbying efforts for migrant worker protection

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34. Adopted by the G.A.Res. 45/158, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://www.december18.net/web/general/page.php?pageID=79#eleven>.

35. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, <http://www.12thaseansummit.org.ph/innertemplate3.asp?category=docs&docid=23>.

36. G.A. Res. 217A(III), at 71, U.N. Doc. A/180 (Dec. 10, 1948); U.N. GAOR, 3d Sess., Supp. No. 13.

37. *Supra* note 35, para. 3.

38. *Id.* para. 22.

39. Heng Chee How, 86 SING. PARLIAMENT REP. (May 27, 2009).

40. E.g., pro-government groups like the National Trade Union Congress (NTUC) has established a Migrant Workers Forum to look after the interests of foreign workers, in conjunction with the SNEF. According to Mr. Hawazi Daipi (Senior Parliamentary Secretary, Acting Minister for Manpower and Minister for Health): “There will be a contact point and a hotline to ensure that foreign workers have access to advice on employment rights and how to seek help if they need it. Where MOM’s mediation is sought, the Migrant Workers Forum will refer these cases to the Ministry for help. The Forum will take an active role in providing humanitarian assistance so that workers are not left stranded with no

and rights. This has been characterised as one of “education, enforcement and social support.”<sup>41</sup> The Employment of Foreign Manpower Act<sup>42</sup> for example requires employers to provide acceptable accommodation and medical care for workers; the Ministry of Manpower (MOM) will prosecute those who fail to do so. In addition, MOM distributes handbooks to new workers as educative measures on workplace safety and health issues.<sup>43</sup> MOM has put in place “early intervention measures to detect non-payment of salaries” and also conducts inspections on workers dormitories.<sup>44</sup> Insofar as sending countries are concerned, the government “engages” with the embassies of labour source countries to resolve problems faced by their nationals working in Singapore and “share . . . relevant information obtained during the course of investigations,” including information about employment agencies which exploit workers in source countries.

Thus, the predominant approach is privatising the relationship between FDWs and their employers in terms of working conditions, including minimum wage.<sup>45</sup> The government only goes so far as to stipulate employment guidelines<sup>46</sup> and steps in to resolve disputes between foreign domestic workers and their employers where the former raises a complaint before the Ministry of Manpower.<sup>47</sup> While accredited employment agencies are required to use a standard employment contract for FDW which stipulates one rest day a month, on pain of non-renewal of licences, MOM is content to urge granting FDWs regular rest days “if possible” without mandating a fixed number, in recognition of “the unique nature of domestic

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food or shelter. They will also be organising basic training in areas like English and social activities to help foreign workers live in this country in harmony with our citizens. The Forum will also seek feedback from employers about foreign worker management issues.” 85 SING. PARLIAMENT REP. (Feb. 13, 2009).

41. *Id.* See also Mr. Gan Kim Yong (Acting Minister for Manpower), 84 SING. PARLIAMENT REP. (Apr. 21, 2009) (Foreign Workers and Work Permit Holders: Sources of Help and Support) (identifying the role of MOM in providing a toll-free helpline, regular dormitory road shows to reach out to foreign workers, random interviews with first time foreign domestic workers and investigating breaches of the Employment of Foreign Manpower Act and other relevant laws. MOM may also bar errant employers from employing foreign workers in the future).

42. The Employment of Foreign Manpower Act, (2007) Cap. 91A (Sing.).

43. See 85 SING. PARLIAMENT REP. (Feb. 13, 2009) (Budget: Head S Ministry of Manpower).

44. Mr. Hawazi Daipi (Senior Parliamentary Secretary, Acting Minister for Manpower and Minister for Health), 85 SING. PARLIAMENT REP. (Feb. 13, 2009) (Budget: Head S Ministry of Manpower).

45. “Domestic workers” are excluded from the ambit of minimum wage legislation contained in the Employment Act, Cap. 91.

46. Employer’s Guidelines: Employment Laws and Contracts at Ministry of Manpower website, [http://www.mom.gov.sg/publish/momportal/en/communities/work\\_pass/foreign\\_domestic\\_workers/employers\\_guidelines/Employment\\_Laws\\_and\\_Contracts.html](http://www.mom.gov.sg/publish/momportal/en/communities/work_pass/foreign_domestic_workers/employers_guidelines/Employment_Laws_and_Contracts.html) (last visited Oct. 26, 2009).

47. This discounts the unequal bargaining power existing between both parties and the fact that foreign domestic workers may not be able to contact the relevant Ministry, such as where their employers lock them up in apartments.

work.”<sup>48</sup> The favoured educative approach is reflected in requiring first time employers and FDWs to attend a mandatory orientation scheme where a third party explains what it means to work in a household, which “sends a signal to the maid that there are rights” and avenues to ensure their protection.<sup>49</sup>

The courts have to some extent recognised that FDWs represent a “category of persons in need of greater protection”<sup>50</sup> and abusing them constituted an “aggravating factor” in sentencing considerations.<sup>51</sup> Parliament in 1998 amended the Penal Code to provide deterrent sanctions through harsher penalties for maid abuse, which apparently caused a significant decline in abuse cases.<sup>52</sup> The High Court has noted that for Singaporeans, “the luxury of having foreign help depends greatly on good relations with neighbouring states”<sup>53</sup> and while it would be an “administrative nightmare” if the authorities had to check on every maid’s living conditions, employers in breach of the law would be punished. Yong CJ noted: “Maid abusers have certain misconceptions which must be corrected. A maid sells her services; she does not sell her person. An employer should not exploit his maid’s dependence on him for food and lodging, for these are basic rights. A maid’s abased social status does not mean that she is any less of a human being and any less protected by the law.”<sup>54</sup>

The bottom line is that at international law, Singapore has only adopted hortatory guidelines or “soft” international law measures primarily in the form of the 2007 ASEAN *Declaration on the Protection and Promotion of the Rights of Migrant Workers* and enforces migrant workers rights not through comprehensive legislation but through “soft” promotional measures

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48. Mr. Hawazi Daipi (Senior Parliamentary Secretary, Acting Minister for Manpower and Minister for Health), 85 SING. PARLIAMENT REP. (Feb. 13, 2009) (Budget: Head S Ministry of Manpower).

49. Dr. Ng Eng Hen, 75 SING. PARLIAMENT REP. (Aug. 27, 2007) (Abuse of Foreign Maids: Standards of Employment and Welfare), col. 772, at 780.

50. Farida Begam d/o Mohd. Artham v. Pub. Prosecutor, [2001] 4 SLR 610, para. 24.

51. Notably too, deterrent sentences are also meted out to violent domestic workers. Purwanti Parji v. PP, [2005] 2 SLR 220. Pub. Prosecutor v. Sundarti Supriyanto, [2004] 4 SLR 622.

52. Ng, *supra* note 49, at 773.

53. Farida Begam d/o Mohd. Artham, *supra* note 50, para. 28. In this respect, see *Contemplacion v. PP*, [1994] 3 SLR 834. Where a Filipino maid was hung for murder, causing an international incident with the Philippines. See *The Furor Over Flor* (Mar. 31, 1995), *Asiaweek* at 36; New York Times, *Filipinos Protest Singapore Death Sentence* (Mar. 16, 1995), available at <http://www.nytimes.com/1995/03/16/world/filipinos-protest-singapore-death-sentence.html>. A parliamentary motion on this was debated where the Law Minister explained a stay of the execution was not given especially this “could have prevented the present strain in Singapore-Philippines relations.” One reason was to avoid setting “a most undesirable precedent” for similar future cases if special concessions were made to foreign nations. 64 SING. PARLIAMENT REP. (May. 25, 1995) (Execution of Flor Contemplacion Motion) at cols. 1185-1200.

54. Farida Begam d/o Mohd. Artham, *supra* note 50, para. 27.

as well as extending, in some cases, protection under existing general legislation or through enhanced criminal sanctions.<sup>55</sup> In this respect, international law has not been a source of constitutional change.

### III. SINGAPORE PRACTICE: THE CONSTITUTION AND INTERNATIONAL LAW

#### A. *The Singapore Constitution's Silence About International Law*

A distinct feature accompanying the wave of constitution making and re-making in the post Cold War era after 1989<sup>56</sup> was the deliberate inclusion of constitutional provisions specifying the juridical status of international law norms within the municipal constitutional order and in some cases, their position in the legal hierarchy. For example, the 2002 *Constitution of Timor Leste*<sup>57</sup> provides for the reception of the two primary sources of international law, treaties and customary international law (CIL) into the East Timorese legal system.<sup>58</sup> Applicable treaty norms invalidate inconsistent domestic rules.<sup>59</sup> This Constitution also specifically identifies the constitutional actors involved in the treaty ratification process,<sup>60</sup> provides that crimes against humanity, war crimes or genocide are liable to criminal proceedings before national or international criminal courts.<sup>61</sup> It demonstrates a consciousness of international human rights standards as part of the domestic normative order. The constitutional preamble reaffirms the Timorese determination “to respect and guarantee human rights” while specific provisions declare that children enjoy “universally recognised” rights, including those contained in treaties Timor Leste is party to.<sup>62</sup> Crime prevention is to be “undertaken with due respect for human rights,”<sup>63</sup> international relations governed by principles including “the permanent sovereignty of the peoples over their

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55. Foreign Minister George Yeo noted Singapore maintained “high standards” of human rights and that “we have provisions either in the Constitution or in statute to safeguard the rights of racial and religious minorities, women, children and workers, including migrant workers.” 84 SING. PARLIAMENT REP. (Feb. 28, 2008) (Budget: Head N - Ministry of Foreign Affairs).

56. E.g., Vladlen Vereshcheetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EURO. J. INT'L L. 29 (1996); Eric Stein, *International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions*, 88 AM. J. INT'L L. 427 (1994); Antonio Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS 341 (1985).

57. CONSTITUTION OF TIMOR-LESTE, available at <http://www.etan.org/etanpdf/pdf2/constfnen.Pdf>.

58. Sec. 9(1) provides for the adoption of “the general or customary principles of international law; clause 2 provides that duly ratified or acceded to treaties will apply “after publication in the official gazette.” CONSTITUTION OF TIMOR-LESTE, §§ 9(1)-9(2) (2002).

59. *Id.* § 9(3).

60. The President (sec. 85) and National Parliament (sec. 95(3)(f)), *id.* §§ 85, 95(3)(f).

61. *Id.* § 160.

62. *Id.* § 18.

63. *Id.* § 147(2).

wealth and natural resources, the protection of human rights.”<sup>64</sup> Furthermore, constitutional actors are expressly required to interpret constitutional fundamental rights “in accordance with the Universal Declaration of Human Rights.”<sup>65</sup>

However, constitutions whose vintage dates back to the era of decolonisation in the 1950s-1960s do not typically contain constitutional provisions indicating the nature of the inter-relationship between international and national law. Former British colonies in South-East Asia which adopted the legal transplants of the common law and the Westminster parliamentary government system, with autochthonous modifications,<sup>66</sup> frequently are silent on the status of international law within the constitutional order. The Singapore Constitution does not contain a formal provision regulating the reception of international law or establishing the hierarchical ordering of international and domestic law.<sup>67</sup> Neither does the text specify which branch of government is involved in the process of treaty-making.

Following British practice, foreign affairs powers are vested in the parliamentary executive or cabinet government. Treaties are not self-executing as the duallist system treats international and municipal law as distinct systems of law, international treaties and agreements have no domestic legal effect until they are incorporated by a subsequent Act of Parliament.<sup>68</sup> As the ruling PAP commands 82 of 84 elective seats, the legislature is not in a position to thwart the Cabinet’s will in this aspect of governance, in its exercise of treaty-making power. There is no formal requirement that the consent of Parliament is required before an international agreement can be entered into, although questions of international legal obligations and domestic obligations have been debated in this forum.

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64. *Id.* § 8.

65. *Id.* § 23. See also art. 31(1) of the CAMBODIAN CONSTITUTION (1993): “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”

66. See generally THE EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION (Li-ann Thio & Kevin YL Tan eds., 2009); Li-ann Thio, *The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to Fit the Imperatives of “Asian” Democracy*, 6 SING. J. INT’L & COMP. L. 181 (2002).

67. Art. 7 authorises the entry into treaties and international schemes whose objectives are beneficial to Singapore, available at <http://statutes.agc.gov.sg>. For example, Singapore is a member-state of the United Nations and ASEAN.

68. Following, e.g. *JH Rayner v. Dept of Trade*, [1990] 2 A.C. 418. See OPPENHEIM’S INTERNATIONAL LAW, VOL 1, PEACE 56-63 (Sir Robert Jennings & Sir Arthur Watts eds., Longman 1996). See Para. 50. (“It must be noted that treaties and conventions do not automatically become part of the law of Singapore. To implement a treaty or convention in Singapore, Parliament has to pass legislation implementing that treaty or convention.”)

B. *Political Branches: Implementing Legislation and the Presumption of Sufficiency and Consistency of Domestic Law vis-à-vis International Norms*

1. *Dualism and Implementing Treaty Obligations*

The government does not uniformly enact legislation to implement treaty obligations. It has readily adopted legislation relating to transport, terrorism, the sale of goods, trade and the environment, for example.<sup>69</sup> These generally have little constitutional implications.

Statutory authorisation to make administrative regulations under the United Nations Act<sup>70</sup> also adheres to the principle of constitutional supremacy. Under this Act, the Minister is empowered to act promptly in making regulations to give effect to non-forcible Article 41 measures required under a mandatory Security Council resolution, particularly in relation to terrorism and international crimes. Section 2(3) provides that regulations made under this parent Act would not be invalid even if inconsistent with “any written law other than the Constitution.” Municipal legislation can provide that treaty provisions override domestic statute but the general principle is the Constitution remains the supreme law of the land.<sup>71</sup>

There is an operating presumption that before Singapore becomes party to an international treaty, its domestic legal framework is assessed to be sufficient to enable it to perform its international obligations. For example, during the Second Reading of the Internationally Protected Persons Bill which was designed to give effect to the *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*,<sup>72</sup> a question was raised as to why Article 9 of the Convention, which deals with

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69. Examples of statutes designed to give effect to international treaties or agreements include legislation to transport (Carriage by Air (Montreal Convention, 1999) Act); diplomatic relations (Diplomatic and Consular Relations Act (Chapter 82A)); security and weapons (Chemical Weapons (Prohibition) Act (Chapter 37B); Terrorism (Suppression of Bombings); trade and environment (Countervailing and Anti-Dumping Duties Act [to bring the law in line with the World Trade Organisation Agreement on Subsidies and Countervailing Measures]); Endangered Species (Import and Export) Act (Chapter 92A); Sale of Goods (United Nations Convention) Act (Cap. 237A).

70. United Nations Act, (2003) Cap. 339 (Sing.).

71. REPUBLIC OF SINGAPORE CONSTITUTION, § 4 (2008). Pub. Prosecutor v. Salwant Singh s/o Amer Singh, [2003] S.G.D.C. 146. This decision affirmed the prevailing dualistic approach towards the relationship between international law and Singapore domestic law in holding that domestic law prevails over the terms of Singapore's international agreement with a foreign state in the event of conflict, given that art. 4 of the Constitution declares the supremacy of the Constitution and the nullity of inconsistent legislation. Thus constitutional law takes precedence over unincorporated international agreements and as such, sentencing powers, as an aspect of art. 93 conferred judicial power, prevails over the terms of extradition agreements which stipulated the maximum term of imprisonment that would be applied to a foreign national, in purported curtailment of judicial sentencing powers.

72. 035 U.N.T.S. 167, 13 I.L.M. 41.



fair treatment of persons charged with such crimes, was omitted. The response was that anyone persecuted under the Act “would be entitled to the rights of due process guaranteed under the Constitution and our other laws”<sup>73</sup> and thus, no specific provision was needed.

Particularly in the field of human rights law,<sup>74</sup> the Singapore government has not seen fit to adopt specific enabling legislation, though, reflective of a gradualist approach, amendments to existing laws may and have been made subsequent to accession. In 1995, Singapore acceded to three topic-specific United Nations human rights treaties for the first time: the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>75</sup> CEDAW<sup>76</sup> and the CRC.<sup>77</sup> In 2007 the Penal Code was amended to give effect to the Genocide Convention by creating the crime of genocide,<sup>78</sup> though this is likely to have little practical effect or constitutional significance in terms of doctrinal development.<sup>79</sup>

No dedicated child rights nor gender equality legislation has been adopted, in contrast to Malaysian practice where the Federal Constitution was amended to include gender as an express prohibited ground of discrimination. In contrast, the Singapore government considers that Article 12 of the Singapore Constitution “enshrines the principle of equality of all persons before the law.”<sup>80</sup> Pursuant to Article 1 of the CEDAW, the CEDAW Committee has urged Singapore to incorporate in the Constitution or statute “a definition of discrimination against women.”<sup>81</sup> The government responded that Article 12(1) which guaranteed equality to all persons included both women and men but the delegation presenting the Third CEDAW Report stated that discussion on a specific gender-discrimination law would continue.<sup>82</sup> Discrete amendments to existing laws have been

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73. Mr. Zainul Abidin Rasheed, 84 SING. PARLIAMENT REP. (Mar. 6, 2008) (Internationally Protected Persons Bill).

74. Li-ann Thio, *Singapore Human Rights Practice and Legal Policy: Of Pragmatism and Principle, Rights, Rhetoric and Realism*, 21 SING. ACAD. L.J. 326 (2009).

75. Convention on the prevention and punishment of the crime of genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

76. GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/34/46 at 193. See Li-ann Thio, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the Transformative Potential of CEDAW*, 1 SING. J. INT'L. & COMP. L. 278 (1997).

77. GA Res. 44/25, annex, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) at 167, entered into force September 2, 1990.

78. Sec. 130D, Penal Code of Singapore.

79. See Second Reading Speech, Senior Minister of State Ho Peng Kee, Penal Code (Amendment) Bill, Oct. 22, 2007, available at [http://www.mha.gov.sg/news\\_details.aspx?nid=1131](http://www.mha.gov.sg/news_details.aspx?nid=1131) (last visited Nov. 22 2007).

80. Para. 3.6 of Singapore's Initial Report to the UN CEDAW Committee: CEDAW/C/SGP/1 stated that prior to accession, the Singapore constitution and laws already contained principles to promote gender equality; AFP, *Equality for women move in Malaysia hailed*, STRAITS TIMES (July 24, 2001).

81. CEDAW Committee Concluding Comments, Aug. 10, 2007, CEDAW/C/SGP/CO/3, para. 14.

82. Para. 4, Response to the list of issues and questions with regard to the consideration of the

presented as fulfilling treaty standards. For example, the intent behind enacting Section 276B(1) of the Penal Code in 2007, which criminalises commercial sex with minors under 18, was to protect the vulnerable from exploitation in relation to sexual services. This was said to be “in line” with the CRC.<sup>83</sup>

At the heart of Singapore’s human rights policy is an unwillingness to “blithely” ignore treaty commitments as Singapore takes “our commitments seriously” consistent with a reluctance “to commit to provisions that we do not agree with fully.” On this basis, it refused to accede to other UN human rights treaties “because of reservations on some specific provisions such as corporal punishment and the death penalty. We will periodically review our position in the light of evolving international norms and practices.”<sup>84</sup> Its avowed concern with substance over form is also evident in its view that establishing a national human rights commission would not necessarily make “a significant different to the human rights condition” and that Singapore maintained “high standards” without one.<sup>85</sup> Thus, the operating presumption is that domestic laws are consistent with international treaty standards, suggesting that the transformative effect of accession is minimal.

When Singapore ratified the CRC, it stated that this did not imply accepting rights “going beyond the limits” prescribed by the Constitution or accepting obligations to introduce new rights as Singapore laws provided “adequate protection and fundamental rights . . . in the best interests of the child”.<sup>86</sup> Nonetheless, a soft “promotional” approach is preferred and the government issued a 2002 Statement on the Interests of the Child which sought to ensure their well-being through ethical principles of behaviour and the National Standards for Protection of Children<sup>87</sup> which guides child protection professionals in discharging their duties. Although the CRC Committee noted that domestic legislation did not fully reflect CRC provisions, it gave credit insofar as CRC principles were in fact implemented

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third and fourth periodic report: Singapore, CEDAW/C/SGP/Q/4/Add1.

83. Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee in the second reading of the Penal Code (Amendment) Bill (Bill 38 of 2007), Singapore Parliamentary Debates, Official Report (Oct. 22, 2007), vol 83, col. 2175, cited by the High Court in *Tan. v. Pub. Prosecutor* [2009] SGHC 111, para. 9.

84. Foreign Minister George Yeo, *supra* note 55.

85. *Id.* See also S. Jayakumar, vol. 69 SING. PARLIAMENT REP., col. 539, (June 30, 1998) (Accession to Human Rights Treaties) explains how Singapore undertakes a careful review of existing laws and practices to be fully satisfied “we can give effect to its provisions” and that a treaty serves the national interest. In relation to International Labor Organisation treaties, Minister of Manpower Dr. Lee Boon Yang noted: “ILO provides a supranational legal framework. It is only when we feel fully comfortable and confident that our legal framework will not in any way clash with the legal framework imposed by ILO that we then proceed to ratify a convention.” 70 SING. PARLIAMENT REP.

86. Para. 3, Instrument of Accession, Oct. 2, 1995.

87. Part III, Written Replies, Singapore Government, List of Issues (CRC/C/Q/SGP/1) received by CRC Committee relating to Singapore Initial Report (CRC/C/51/Add.8)

in practice.<sup>88</sup>

## 2. *Reservations and Supremacy of Domestic Law*

Where Singapore cannot or will not conform to international standards, it deploys the technique of treaty reservations to insulate domestic law from change. In some cases, this has buttressed inegalitarian cultural-religious norms.

In acceding to CEDAW, Singapore appended two significant reservations to Articles 2 (methods of ending discrimination) and 16 (discrimination in marriage and family matters). The reason was “the need to respect the freedom of minorities to practise their religious and personal laws” within Singapore’s multi-racial and multi-religious society, as compliance with CEDAW norms would be contrary to these laws. Thus, inegalitarian laws governing family planning, marital and inheritance rights in relation to Muslim women under the Administration of Muslim Law Act (Cap. 3)<sup>89</sup> are immunised from Article 2(f) of the CEDAW which urges states to abolish “existing laws . . . customs and practices which constitute discrimination against women.” This truncates CEDAW’s potential to bring about change to domestic law.

However, Singapore does review whether to remove reservations subsequent to treaty accession and in April 2004, removed its reservation to Article 9(2) relating to nationality rights. Article 122 of the Constitution was amended to allow Singaporean women to transmit citizenship by descent to their foreign born children.<sup>90</sup> This change was motivated not merely to redress past gender discrimination but also borne out of pragmatism, particularly the declining birth rate and social realities. National imperatives rather than international standards apparently are the “tipping point” for domestic legal reform.<sup>91</sup> Nonetheless, this amendment was presented as an advancement in women’s rights under Article 9 before the CEDAW committee.<sup>92</sup>

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88. Convention on the rights of the child, Jan. 14, 2003, CRC/C/133, para. 391.

89. The relevant minister acknowledged that the reservations were meant to accommodate the Administration of Muslim Law Act (Cap. 3) whose provisions are “not strictly consistent with the full gender parity definition under CEDAW,” given that Islam allows polygamy and sets out different marital obligations for men and women: 77 SING. PARLIAMENT REP., Mar. 16, 2004, col. 1935. For a more extended treatment, see Thio, *supra* note 76.

90. This marked a shift from the reasoning that “the man is traditionally the main or . . . sole breadwinner of the family.” Hence it would be “more practical” for the citizenship of the child born overseas to follow that of the father, since his place of employment “usually” decided where the family resided. Wong Kan Seng (Home Affairs Minister), 75 SING. PARLIAMENT REP., Oct. 1, 2002, col. 1209.

91. 77 SING. PARLIAMENT REP., Apr. 19, 2004 (Constitution of the Republic of Singapore (Amendment) Bill), col. 2792.

92. 83 SING. PARLIAMENT REP., May 22, 2007 (CEDAW). Similarly, while art. 28(1) of the CRC

### 3. *Soft Implementation of International Standards*

As noted above, in relation to implementing treaty-based human rights and labour standards, the preference is not to adopt comprehensive legislation but to address such issues by amending statutes or to work on the assumption that domestic law complies with international standards.

In addition, there is also a preference to implement certain treaties such as ILO Convention 100 (Equal Remuneration for Men and Women)<sup>93</sup> through “privatisation,” such as through collective agreements and Tripartite declarations.<sup>94</sup> Notably, the CEDAW Committee in 2007 urged the adoption of equal pay for equal work legislation to close wage gaps between men and women,<sup>95</sup> a principle enshrined in Article 11(1)(d) of the CEDAW. The government works with various bodies to “to encourage companies and unions to implement the principle of equal remuneration by incorporating this clause in their collective agreements.”<sup>96</sup> This creates no justiciable rights and thus, accountability for compliance with treaty standards rests on the shoulders of Parliament and civil society. The government justifies the downplaying of a rights-based approach in the field of industrial relations, by focusing on the practical results achieved in matters such as fair remuneration and the benefit workers derived from high employment rates.<sup>97</sup> Relationalism, rather than rights, is underscored through the representation of workers interests before the Cabinet by a Minister who is also the Secretary-General of the largest trade union.<sup>98</sup>

### 4. *External Oversight, State Sovereignty and Resistance*

Like many other ASEAN states, Singapore considers that national institutions bear the primary responsibility for implementing human rights.<sup>99</sup>

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refers to compulsory primary education, this was not referenced in the 2000 debates concerning the Compulsory Education Bill. 72 SING. PARLIAMENT REP., Oct. 9, 2000.(Compulsory Education Bill) col. 838 ff. Subsequently, it was reported as a “positive aspect” in Singapore’s Initial Report to the CRC Committee: CRC/C/133 (2003), para. 387.

93. Singapore ratified this treaty in May 2002. 83 SING. PARLIAMENT REP., col. 855 (May 21, 2007).

94. Such as the 2002 Tripartite Declaration (MOM, SNEF and NTUC). The equal remuneration principle was also recognised as a facet of fair employment practices by the Tripartite Alliance for Fair Employment Practices (TAFEP) and incorporated in the Tripartite Guidelines on Fair Employment Practices which was issued by TAFEP on May 3, 2007.

95. *Id.* para. 30.

96. Dr. Ng Eng Hen, 83 SING. PARLIAMENT REP., May 21, 2007, col. 855.

97. Hawazi Daipi, 72 SING. PARLIAMENT REP., Aug. 25, 2000, Widening Inequalities in Society at col. 756.

98. Since a cabinet minister leads the National Trade Union Congress (NTUC), “workers concerns go direct to the Cabinet and it has helped the workers.” *Id.* at col. 759.

99. Para. 9, Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (A/CONF.157/PC/59 of April 7, 1993).

It has not, unlike some ASEAN states, adopted a national human rights commission by Constitution or legislation.<sup>100</sup>

Only the weakest forms of international oversight have been accepted, that is, state reporting and the conciliatory dialogue procedure with the CEDAW and CRC Committees who can only issue non-binding recommendations. The government takes pains to consult non-government groups before drafting state reports e.g. with respect to drafting the first CRC report and discussing how to implement CRC obligations.<sup>101</sup>

The CRC Committee has also voiced concern about the “absence” of an “independent mechanism” able to receive complaints about CRC violations from individuals and empowered to regularly monitor compliance with CRC standards.<sup>102</sup> The CEDAW Committee has encouraged Singapore to improve its complaints procedure regarding constitutional equality rights so that women can challenge discriminatory acts and also urged that it become party to the Optional Protocol.<sup>103</sup> This has been raised and rejected in Parliament on the basis that it would “infringe on a nation’s sovereignty” by enabling the CEDAW Committee to consider individual complaints alleging CEDAW violations and to commence inquiry proceedings. A “fundamental principle of governance” was to ensure Singapore could, without “foreign interference,” investigate and redress complaints of gender discrimination through “the Government Ministries, the Courts and ultimately, Parliament.”<sup>104</sup> The preference is thus to ensure the enjoyment of women’s rights through domestic institutions and processes. Women may where appropriate, lodge police reports aside from resorting to general consultation and dialogue sessions.<sup>105</sup> To date, the relevant government ministry has not received specific complaints about CEDAW violations<sup>106</sup> or been subject to judicial review. In lieu of a specific complaints mechanism, children with

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100. See Thio, *supra* note 24, at 60-71; Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia’s National Human Rights Commission*, 39 STAN. J. INT’L L. 59 (2003). Chapter XI of the 2007 Thai Constitution provides for a National Human Rights Commission, <http://www.nhrc.or.th/index.php?lang=EN>. The Thai King appointed 7 members on June 25, 2009.

101. Convention on the rights of the child, Jan. 14, 2003, CRC/C/15/Add.220, para.12 (Response to Initial State Report before CRC Committee).

102. *Id.*

103. Paras. 89 and 94, *Report of the CEDAW Committee*, 24th Sess., (2001), General Assembly Official Records, 56th Sess., Supplement No. 38 (A/56/38).

104. Mrs. Yu-Foo Yee Shoon, 83 SING. PARLIAMENT REP., May 22, 2007 (Optional Protocol, CEDAW), col. 892.

105. Response to the list of issues and questions with regard to the consideration of the third periodic report: Singapore, CEDAW/C/SGP/Q/3/Add1, para. 5.

106. The focal point appears to be the Women’s Desk of the Ministry for Community Development, Youth and Sport (MCYS). The CEDAW Committee has expressed reservations about its symbolic location within the Family Development Group of the MCYS and urged that Singapore “elevate the status of the national machinery for the advancement of women” to enhance its mandate and enable it to develop gender equality policies and to monitor their implementation. CEDAW Committee Concluding Comments, Aug. 10, 2007, CEDAW/C/SGP/CO/3, para.18.

complaints “can approach his carer, teacher or family,” contact the IMC-CRC and give feedback through the MCDS hotline or via email, or non-government groups like the National Youth Council and Family Service Centre hotline.<sup>107</sup>

This reflects an anti-institutionalism towards creating specific rights protective mechanisms, in preferring diffused outlets rather than a dedicated procedure for human rights promotion and protection,<sup>108</sup> this inhibits the development of a rights-oriented culture and the adversarial litigiousness this engenders, reflected in favouring informal petitionary approaches towards dispute resolution where citizens are urged to utilise informal avenues to provide feedback<sup>109</sup> or raise concerns with parliamentarians. Indeed, the CEDAW committee was concerned that advancing women’s rights “was being implemented as a welfare framework rather than a human rights framework.”<sup>110</sup> The latter approach entails clearly articulated, measurable obligations owed by the state to individuals, which individuals may launch formal complaints about, whereas welfare programmes are not justiciable and their realisation depends on the good faith, prudence and sagacity of the implementing government, subject to modes of political rather than legal accountability.

## 5. *Domestic Oversight*

### (a) Privatisation and Soft Implementation

The preference is to adopt “soft” methods of enforcing rights. For example the MOM, together with NTUC and Singapore National Employers Federation in March 1999 released “soft” non-binding tripartite guidelines to address discriminatory hiring measures. Reportedly, since its release, “recruitment advertisements which specify gender, age, race or religion had dropped from about 30% to less than 1%.” The Minister said his ministry would “continue to persuade the last few employers to adopt non-discriminatory practices when they advertise for new employees.”<sup>111</sup>

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107. Para. 3, Written Replies, Singapore Government, List of Issues (CRC/C/Q/SGP/1) received by CRC Committee relating to Singapore Initial Report (CRC/C/51/Add.8)

108. Calls for an independent elections commission, Women’s Affairs Ministry and Equal Opportunities Commission have been shot down. *See* Thio, *supra* note 20, at 59-61.

109. The Committee on the Family, which reports to the Ministry for Community Development, is a feedback avenue for women’s issues: Paragraph 3.4, Initial Report, CEDAW Committee, 19. When Opposition MP raised the issue of establishing a Board of Equal Rights to allow all citizens complaining of unfair discrimination, Minister of State for Law Ho Peng Kee said there was sufficient redress through judicial review or through contacting MPs or government ministries who take appeals concerning rights violations “very seriously.” SING. PARLIAMENT REP., Vol. 69, June 30, 1998, Board of Equal Rights, cols. 380-381.

110. Para. 30, CEDAW/C/SR.514 (Sept. 7, 2001), Summary Record, 514th Meeting, CEDAW Committee.

111. Dr. Lee Boon Yang (Minister for Manpower), 70 SING. PARLIAMENT REP., Aug. 18, 1999,

Complaints of discriminatory employment practices would elicit Ministry investigation, though no formal complaints mechanism has been established. This reflects a preference for an *ad hoc* approach to such matters.

Another form of “privatization” is through denying the “horizontal” reach of human rights norms.<sup>112</sup> For example, Article 2(e) of the CEDAW authorises the state “to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.” This implicates private, non-state actors and is potentially intrusive. However the effect of CEDAW is somewhat truncated by reservations which permit the Singapore government to adopt a “hands off” approach towards implementing egalitarian norms which challenge patriarchal social relations informed by culture or religion, in the name of minority protection.<sup>113</sup>

(b) Parliament, Rights Protection and Accountability

Although not a regularised complaints process, Parliament provides a forum for raising human rights issues. As the Constitution contains no justiciable socio-economic rights, parliamentary questions are one method of holding the government to account in relation to social welfare issues, given that CEDAW and CRC as well as the various ILO treaties Singapore is party to address socio-economic rights and concerns.<sup>114</sup>

For example, the minister in 1994 responded to parliamentary questions about homeless or destitute persons<sup>115</sup> and indicated that some 1341 destitute persons under the Destitute Persons Act (Cap. 78) (including beggars or persons without visible means of subsistence or place of residence) were living without charge in three government houses, some of whom were being trained for employment or engaged in suitable work to contribute towards their maintenance. The Constitution under Article 10(2) prohibits forced labour, excepting laws on compulsory national service. In response to the criticism by the International Labour Organisation that this Act violated the ILO Forced Labour Convention to which Singapore was party,<sup>116</sup> it was defended as a piece of social legislation that provided shelter,

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col. 2130-2132.

112. In contrast, CEDAW has been unsuccessfully invoked in the Malaysian case of *Beatrice a/p At Fernandez v. Sistem Penerbangan Malaysia & Anor*, [2005] 3 MLJ 681 which concerned employment law and the dismissal of a pregnant flight stewardess.

113. Singapore’s reservation to CEDAW states: “In the context of Singapore’s multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of arts. 2 & 16 where compliance with these provisions would be contrary to their religious or personal laws.”

114. For an analysis of domestic law against standards in ILO Convention 138 (Minimum Age for Admission to Employment), see Chan Wing Cheong, *Protection of Underaged Workers in Singapore: Domestic and International Regulation*, 17 SING. ACAD. L.J. 668 (2005).

115. *1,341 Destitute persons in Govt Homes*, STRAITS TIMES (Mar. 8, 1994) 25.

116. US STATE DEPARTMENT, US COUNTRY REPORT (1999), [http://www.state.gov/www/global/human\\_rights/99hrp\\_index.html](http://www.state.gov/www/global/human_rights/99hrp_index.html).

care and rehabilitation of destitute persons with a view to societal reintegration.

Parliamentarians have also raised the question of whether existing policies, such as the one-thirds quota limiting the number of female medical students in local universities contravened Article 10 of the CEDAW as gender discrimination in terms of access to education. The Minister merely rejected this interpretation<sup>117</sup> and refused to refer the issue for judicial solution under Article 29 of the CEDAW. This belies the weakness of parliamentary oversight in isolation as a check on executive policy.<sup>118</sup> The eventual removal of this quota in 2003 was presented as a more effective implementation of CEDAW standards and so commended by the UN CEDAW Committee;<sup>119</sup> however in the domestic context, the relevant Minister was content to note that the quota would be lifted, acknowledging the role of MPs, especially female ones, who raised this issue and merely adding “Good things come to those who wait.” Any celebration of the vindication of gender equality was at best muted.<sup>120</sup>

(c) Ministerial Oversight and Cross-Cutting Responsibilities

The human rights treaties Singapore has acceded to is not monitored by a dedicated body but by an Inter-Ministry Committee which co-ordinates the various government departments to ensure observance of CRC and CEDAW standards.<sup>121</sup> The IMC signals that all ministries bear cross-cutting responsibilities where their portfolio relates to gender and child issues; the IMC’s modus operandi is to consult and solicit non-government views on how to translate treaty principles into practice. What must be appreciated is that the socio-economic and other rights contained in the human rights or labour rights treaties Singapore has acceded to, being non-justiciable, may be promoted and implemented by the political branches alone.

C. *The Courts and International Law*

1. *Foreign Affairs and Non-Justiciability*

Whether international law will shape constitutional discourse and practice through the gateway of the national court turns on several factors,

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117. The government did not consider such policy a violation of CEDAW obligations as there was no quota on the number of female doctors who could practice in Singapore. *No’ to Removal of Quota on Female Medical Students*, STRAITS TIMES (Aug. 26, 1994).

118. 75 SING. PARLIAMENT REP., Nov. 25, 2002 (CEDAW: Compliance with art. 10), cols. 1518-1522.

119. 83 SING. PARLIAMENT REP., Oct. 22, 2007 (CEDAW: Singapore’s Third Report), col. 2164.

120. Mr. Lim Hng Kiang (Minister for Health), 75 SING. PARLIAMENT REP., Dec. 5, 2002, Medical Registration (Amendment) Bill, col. 1963.

121. *Id.*



not least, their receptivity to international law (which implicates questions of juridical status, source of international law, reception and hierarchy) in general, and the particular field of activity subject to international legal regulation.<sup>122</sup> The restriction of executive action by judicial review, invoking international law-based arguments, also implicates separation of powers issues.

The parliamentary executive or cabinet government is responsible for conducting foreign relations; this is a matter of accepted practice rather than specific constitutional allocation of functions, and would be treated as a “given” amongst lawyers trained in the Westminster constitution mindset. This is a facet of prerogative powers which are not defined exhaustively in the Constitution.

In matters bearing on politically sensitive external affairs, national courts have usually been deferential towards the exercise of foreign affairs powers by the executive, pursuant to following a “one voice” policy. This was evident in *Civil Aeronautics Administration v. Singapore Airlines Ltd.*<sup>123</sup> where the court refused to depart from the executive position that Taiwan was not a state and thus could not claim sovereign immunity against civil proceedings. As an application of the separation of powers, “whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the exclusive province of the Executive to determine”<sup>124</sup> as this was not a purely factual matter but involved considerations of policy which courts were ill-equipped to handle. Thus, courts should not “get involved in international relations” nor reach a conclusion inconsistent from that of the Executive.<sup>125</sup> This is because there are “areas of prerogative power that the democratically elected Executive and Legislature are entrusted to take charge of, and, in this regard, it is to the electorate, and not the Judiciary, that the Executive and Legislature are ultimately accountable.”<sup>126</sup>

Techniques of judicial avoidance typically include doctrines of justiciability or “political questions.” However, this judicial culture of resistance towards international law may be diminishing, as manifested by

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122. *Tan v. Seow*, [1989] SLR 257, para. 16. The High Court noted that in the event of a conflict with domestic and international law, the former prevailed but that a state’s failure to comply with international law could still incur international responsibility which was a “distinct and separate matter.” See generally CL Lim, *Public International Law Before the Singapore and Malaysian Courts*, 8 SING. Y.B. INT’L L 243- 81 (2004).

123. *Civil Aeronautics Admin. v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, 576-580, paras. 12-28.

124. *Id.* para. 22.

125. *Id.* paras. 22, 27. For a comparison of two distinct judicial approaches towards issues of recognition, see Olufemi A. Elias, *The International Status of Taiwan in the Courts of Canada and Singapore*, 8 SING. Y.B. INT’L L. 93 (2004).

126. [2007] 2 SLR 453, 99.

an increased willingness to adopt a nuanced approach towards the interpretation and application of international law. This is evident in the development of a more calibrated rather than blanket approach towards identifying all “foreign affairs” issues as non-justiciable.

In particular, the High Court in *Lee Hsien Loong v. Review Publishing Co., Ltd.*<sup>127</sup> held that not all prerogative powers are immune from judicial review as the test of review does not turn on the source but nature of public power exercised. Sundaresh Menon JC borrowed from certain English authorities in identifying various principles to ascertain the justiciability of a particular exercise of executive power.<sup>128</sup> He underscored the importance of a contextual, non-categorical approach in deciding issues of justiciability, adding there were “clearly provinces of executive decision-making” immune from judicial review.<sup>129</sup> Typically, these involved matters of “high policy” over which “there can be no expectation that an unelected judiciary will play any role,” such as boundary disputes or the recognition of foreign governments. It was important too that judicial pronouncements should not embarrass another branch of government and the court should exercise self-restraint accordingly.<sup>130</sup> This was “a reflection of the constitutional doctrine of the separation of powers.”<sup>131</sup> Defence policy for example is distinct from administrative actions which interfere with individual rights, such as immigration decisions, which may be justiciable, even if both matters implicate national security. Thus the courts may find justiciable a case where “what appears to raise a question of international law in fact bears on the application of domestic law,”<sup>132</sup> such as where courts are able to “isolate a pure question of law from what may generally appear to be a non-justiciable area.”<sup>133</sup> This required that the separation of powers

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127. *Id.*

128. *E.g.*, he quoted Taylor L. J, at 820 in *R v. Foreign Sec’y of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 Q.B. 811. “[W]hether judicial review of the exercise of a prerogative power is open depends upon the subject matter and in particular upon whether it is justiciable. At the top of the scale of executive functions under the Prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving parliament, mobilising the Armed Forces. Clearly those matters, and no doubt a number of others, are not justiciable but the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.” [2007] 2 SLR 453, 91.

129. *Id.* para. 95.

130. *Id.* at 490-91.

131. *Id.* para. 95.

132. *Id.* para. 98.

133. Noting counsel’s reference to the Federal Australian Court decision of *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2006] FCAFC 116, at 12 (challenging the whaling activities of a Japanese company in an area designated as a whale sanctuary under Australian law), available at [http://www.hsi.org.au/editor/assets/legal/Whale\\_Case\\_judgement\\_15\\_Jan\\_2008.pdf](http://www.hsi.org.au/editor/assets/legal/Whale_Case_judgement_15_Jan_2008.pdf).

principle “be interpreted and applied sensibly.”<sup>134</sup>

## 2. *International Law as Source of Constitutional Law*

International law has been considered in ascertaining the scope of legislative power, with the Court of Appeal overturning the High Court decision in *PP v. Taw Cheng Kong*.<sup>135</sup> The specific issue was whether Parliament had the power to enact extra-territorial anti-corruption laws. No legal instrument was needed to confer plenary legislative power on the Singapore Parliament upon “the political fact of Singapore’s independence on 9 August 1965.”<sup>136</sup> This is because “it acquired the attributes of sovereignty” and the “inherent nature” of being “an independent sovereign republic” meant Parliament had the power to legislate extra-territorially, even if it could not enforce it in foreign jurisdictions, as, under international law “a statute generally operated within the territorial limits of the Parliament that enacted it.”<sup>137</sup>

## D. *Human Rights Law and Constitutional Adjudication*

The Malaysian and Singapore constitutions do not contain the term “human rights” (which suggests a certain universality of application) but rather refer to “fundamental liberties.” This may be contrasted with later Westminster-based constitutions whose drafting was influenced by the ECHR<sup>138</sup> and subsequent ECtHR jurisprudence.

To the extent that international law arguments are given weight by municipal courts, international law (which as a basis of collective standards may be binding), together with comparative constitutional arguments (which are usually of persuasive weight before common law courts) may facilitate the cross-national harmonisation or fertilisation of judicial standards. Much depends on the theory or judicial approach to constitutional adjudication, whether nationalist or internationalist, and how this influences receptivity or resistance towards human rights standards. To gauge the influence of human rights law on constitutional rights adjudication, one must consider the purposes for which human rights law is invoked in constitutional argument,

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134. [2007] 2 SLR 453, at 98.

135. *Pub. Prosecutor v. Taw Cheng Kong*, [1998] 2 SLR 410 (C.A.); [1998] 1 SLR 943 (H.C.).

136. *Id.* para. 30.

137. *Id.* para. 66.

138. Trinidad and Tobago Constitution (Aug. 1st, 1976), Preamble, Chapter 1. Lord Wilberforce in describing the “special characteristics” of the Bermuda Constitution noted that like many other Caribbean constitutions, its drafting in the post-colonial period was “greatly influenced” by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cm 8969) which was itself influenced by the 1948 UDHR. *Minister of Home Affairs v. Fisher*, [1980] 1 A.C. 319, 328 (U.K.).

whether to support a conclusion derived from applying national law or where it is used as a means of founding or creating constitutional rights. As human rights norms are often drafted at a fairly abstract level, one must allow for divergent application in concrete situations; such norms may not be sufficiently precise to inform the adjudicatory process, other than to underscore the importance of a constitutional right which is also simultaneously a universally accepted customary human rights norm or an applicable treaty-based norm.

While foreign case law may be persuasive but not binding within common law jurisdictions where the principle of *stare decisis* is observed, international law as the law of the international community as a whole cannot exist unless its constituent members are subordinate to it; in that sense, it provides a higher level of governance in checking lower “domestic” levels of governance to ensure coherence with international norms. This of course presupposes that the issue of supremacy is settled, as a hierarchy of law is necessary to ensure that the “higher” law can ensure the coherence and compliance of the “lower” law.

The operating presumption in interpreting parliamentary intention is that Parliament intends to act consistently with international standards or “international comity,”<sup>139</sup> unless the clear statutory words require otherwise. However, international standards may not be sufficiently precise to afford guidance in the adjudicatory process. It is also worth noting that the judicial receptivity to international law will be conditioned by factors such as whether a broad or restrictive approach towards standing is adopted, the interpretive method applied in construing rights, the range of justiciable rights recognised and whether cultural values, such as the statist or communitarian “Asian values” school resist more individualist renderings of human rights<sup>140</sup> which, if received, might galvanise a more rights-oriented legal culture. Rights claims in Singapore are evaluated against competing rights claims and the interests of the ethnic groups and the national community at large and in this context, rights are not “trumps” but merely a relevant factor amongst other competing factors, that is, a defeasible interest.<sup>141</sup>

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139. Pub. Prosecutor v. Taw Cheng Kong, [1998] 2 SLR 410, 434 (1998). See also the rule governing purposive interpretation under sec. 9A, Interpretation Act, (2002) Cap. 1 (Sing.).

140. Thio, *supra* note 13. For example, Singapore’s shared values white paper notes that a “major difference” between “Asian and Western values” is “the balance each strikes between the individual and the community” which was a “question of degree,” as an “Asian society,” Singapore “weighted group interests more heavily than individual ones,” as defined by the government on behalf of the entire population, rather than specific ethno-cultural groups. Shared Values white paper (Cmd. 1 of 1991), paras. 24, 26. This paper appears to have influenced constitutional interpretation. See, e.g., Benedict Sheehy, *Singapore, “Shared Values” and Law: Non East versus West Constitutional Hermeneutic*, 34 H.K.L.J. 67 (2004).

141. Pub. Prosecutor v. Koh, [2005] S.G.D.C. 272.

### 1. *Standing*

In the Singapore context, it might be noted that a relatively lenient approach towards standing has been adopted in relation to allegations of constitutional rights violations. In *Colin Chan v. Minister for Information and the Arts*,<sup>142</sup> the Court of Appeal affirmed that any citizen had standing to bring a constitutional rights case:

If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen's interest in seeing that his constitutional rights are not violated. A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.

This has not however, spawned a spate of public law litigation comparable to that fuelled by public interest litigation, facilitated by expansive standing rules,<sup>143</sup> in South Asian jurisdictions.

### 2. *Expansive vs. Restrictive Interpretation of Rights Guarantees*

Notably, the Indian courts have adopted an activist posture in applying broad readings to the meaning of the protection of life and personal liberty Article 21 clause in the Indian Constitution.<sup>144</sup> This has been construed broadly to address quality of living environment<sup>145</sup> as well as livelihood-related issues. "Personal liberty" has been broadly construed to include the right to travel.<sup>146</sup> However, the opportunities for international law to feed the concept of "personal liberty" are stunted if not aborted where a narrow construction is given to such open-textured concept. For example, in the Singapore context, the right to "personal liberty" is narrowly understood "to refer only to the personal liberty of the person against unlawful incarceration or detention."<sup>147</sup>

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142. *Chan v. Minister for Information and the Arts*, [1996] 1 SLR 609.

143. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989).

144. Art. 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

145. E.g., *A.P. Pollution Control Bd. II v. Nayudu*, [2000] S.C. 679; [2001] 2 S.C. 62 (India), available at <http://www.commonlii.org/in/cases/INSC/2000/679.html> (developing the right to "healthy environment" as part of the right to "life" under art. 21 of the Indian Constitution).

146. *Gandhi v. Union of India*, AIR [1978] S.C. 597 (1978).

147. *Lo v. Mamata Kapildev Dave*, [2008] 4 SLR 754, para. 6 (rejecting the argument that it encompassed a right of personal liberty to contract).

### 3. *Range of Justiciable Rights*

The range of justiciable rights also expands or contracts opportunities for international human rights standards to influence constitutional discourse. For example, in Singapore, socio-economic rights are not justiciable and were for that reason deliberately excluded from the Part IV Fundamental Liberties Chapter.<sup>148</sup> Social welfare concerns, rather than enforceable rights, are thus discussed within the context of political bodies like Parliament.

### 4. *Parliament and Courts—Judicial Deference*

The restrictive approach towards construing enumerated rights is not unexpected given the judicial deference towards Parliament with respect to revising existing legislation to give greater weight to a liberty interest, consonant with the operative “strong presumption of constitutional validity”<sup>149</sup> extant in Singapore case law. For example, the High Court in *Lee Hsien Loong v. Review Publishing Co., Ltd.*<sup>150</sup> rejected that a general media privilege for political libel applied as part of the common law in Singapore, noting that even if the scope of this contended for privilege should be extended under the Defamation Act, “that should be done by Parliament. The court should be slow to extend such a privilege.”

Where the executive has taken a strong position, such as rejecting the idea that conscientious objection forms part of the Article 15 constitutional guarantee of religious freedom, the courts are unlikely to oppose this. For example, in *Chan Hiang Leng Colin v. Public Prosecutor*,<sup>151</sup> the High Court upheld the constitutionality of prohibition orders issued under the Undesirable Publications Act<sup>152</sup> which imposed a blanket ban on all materials published by the publishing arm of the Jehovah’s Witnesses, regardless of content. The sect had been deregistered under the Societies Act<sup>153</sup> in 1973 because they were considered prejudicial to public peace and welfare for refusing to perform compulsory military service. The High Court did not consider the issue of conscientious objection, which is not a universally recognised expression of religious liberty, but instead elevated national service, which is regulated by statute, as a “fundamental tenet” such that “[a]nything which detracts from this should not and cannot be

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148. Li-ann Thio, *Protecting Rights*, in *THE EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION*, *supra* note 66, at 198-201.

149. *Pub. Prosecutor v. Taw Cheng Kong*, [1998] 2 SLR 410, 431, para. 60D.

150. *Lee v. Review Publ’g Co., Ltd.*, [2009] 1 SLR 177, 259, para. 226.

151. *Chan v. Pub. Prosecutor*, [1994] 3 SLR 662.

152. Undesirable Publications Act, (2007) Cap. 338 (Sing.).

153. Societies Act, (2007) Cap. 311 (Sing.).

upheld.”<sup>154</sup> The judge discounted arguments that the ban violated not only the Article 15 but also “international declarations of human rights,”<sup>155</sup> specifically, Article 18 of the UDHR. While paying lip service to balancing rights and competing interests, the Court appeared to apply determinative weight to the state’s interest, which trumped individual rights. It declared an extra-textual principle that the “sovereignty, integrity and unity” of Singapore was the “paramount mandate” of the Constitution such that anything, including fundamental liberties like religious freedom “which tend to run counter to these objectives must be restrained.” Yong CJ rejected the requirement that a “clear and present” danger was needed before a constitutional right could be restricted, which would give more space to individual liberties. Instead, he appeared to be driven by bureaucratic concerns commonly associated with the executive branch, noting that any official who waited until trouble over religious belief was “just about to break out” before acting was “not only pathetically naive but also grossly incompetent.”<sup>156</sup> Furthermore, anything less than a blanket ban of JW publications “would have been impossible to monitor administratively.”<sup>157</sup> This prioritises administrative convenience and efficiency over rights, allowing state interests to trump rights rather than vice versa. Individual freedoms are thus subject to state-defined community concerns.

The court treated the executive position on conscientious objection as determinative, in referring to ministerial statements to the effect that it did not apply to Singapore, as opposed to certain Western European countries, as otherwise, “National Service will come unstuck.”<sup>158</sup> Military service was considered a “secular issue, subject to government laws,” rather than an exercise of religious freedom rights. Singapore participated in issuing a joint statement with 15 other countries before the UN Commission on Human Rights in 2002 stating they did not recognise the universal applicability of conscientious objection to military service.<sup>159</sup> By so objecting, this demonstrates that the relevant norm cannot be a universally binding customary international law as it lacks general acceptance by states. As the executive and judiciary speak with “one voice” towards this putative exercise of religious liberty, this means there is little scope to assert a dissenting interpretation of religious freedom before both legal and political

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154. Notably, other countries have constitutionalised a duty to perform military service. *Chan v. Pub. Prosecutor*, [1994] 3 SLR 662, 678B.

155. *Id.* at 681I.

156. *Id.* at 683BD.

157. *Id.* at 687C.

158. *Id.* at 685E-F (quoting BG Lee Hsien Loong’s second reading speech during the Maintenance of Religious Harmony Bill debates (Hansard, Feb. 23, 1990, at 1181)).

159. Letter, Permanent Representative of Singapore to Chairperson, 58th Sess., Commission on Human Rights, E/CN.4/2002/188 (Apr. 24, 2002).

forums in Singapore.

(a) Non-Binding “Soft” International Law

There have been instances where courts in Asian jurisdictions have cited non-binding “soft” international law for various purposes. The Indian courts have for example, cited various declarations on environmental law to buttress their argument that the constitutional right to life should be interpreted broadly to include a right to a healthy environment,<sup>160</sup> that is, to give effect and content to a broad construction of fundamental constitutional rights. Other soft international law documents like the (then) UN Declaration on the Human Rights of Indigenous Peoples were cited fairly extensively<sup>161</sup> before Malaysian courts by Ian Chin J in *Nor Anak Nyawai v. Borneo Pulp Plantation*<sup>162</sup> which concerned native land title. This was not cited to ground a legal claim as the draft declaration played “no part in my decision” as it did not form “part of the law of our land.” It was invoked for educative purposes, as the relevant provisions “provide valuable insight as to how we should approach matters concerning the natives.” Appreciating these standards showed “how wrong” the defendant government authorities’ attitudes towards Sarawak natives were, particularly given the natives’ special constitutional position,<sup>163</sup> and elucidated the “global attitude towards natives.”<sup>164</sup> Thus, international human rights law was cited to censure and educate state officials.

Where “soft law” instruments have been cited before Singapore courts by defence counsel, the Court has focused on two things: the juridical quality of the instrument and its substantive content. For example, in *PP v. Nguyen Tuong Van*<sup>165</sup> the constitutionality of the mandatory death penalty under the Misuse of Drugs Act was challenged. Counsel cited the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region adopted at the 6<sup>th</sup> Conference of Chief Justices of Asia and the Pacific on 19 August 1995 with a view to underlining the importance of the judiciary in death penalty cases. The Statement itself affirmed the central role of the

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160. *A.P. Pollution Control Bd. II v. Nayudu*, [2000] S.C. 679, [2001] 2 S.C. 62 (India), available at <http://www.commonlii.org/in/cases/INSC/2000/679.html>.

161. Art. 7 (prohibition against ethnocide, cultural genocide and regulation of population transfers), art. 8 (right to maintain cultural characteristics and distinct identities), art. 9 (right to belong to indigenous community), and art. 10 (prohibition against forcible removal from land).

162. *Nor Anak Nyawai v. Borneo Pulp Plantation*, (2001) 6 MALAYAN L.J. 241, 297.

163. FEDERAL CONSTITUTION OF MALAYSIA, art. 161A.

164. *Nor Anak Nyawai*, (2001) 6 MALAYAN L.J., at 297. The judge was particularly annoyed because the defendant counsel had labeled the plaintiffs as prosperous because they were able to “travel down to Kuching and observe the court proceedings for the duration of the trial.” This exemplified the “delusions” the defendants were laboring under in “equating someone as being prosperous just because he can make it down to Kuching from a longhouse. That attitude is of no surprise to me after all they have regarded providing a job that pays a sum near the poverty line as being very charitable to plaintiffs which they should not have refused.”

165. *Pub. Prosecutor v. Nguyen Tuong Van*, [2004] 2 SLR 328, 359, paras. 99-101.



judiciary in promoting human rights and in being empowered to determine whether it has jurisdiction over a justiciable issue. Counsel argued that sentencing was “fundamentally justiciable” and that sentence should be passed by “an independent and impartial tribunal offering the accused ‘the equal protection of the law.’”<sup>166</sup> Lai J noted this statement lacked the “the force of a treaty,” contained nothing relating to mandatory death sentences and thus did not assist the argument that such sentences were illegal. There was no consideration of whether it declared an existing customary international law norm which is universally binding without express consent.

Notably, the Court in revisiting the test of liability for contempt by “scandalising the court” agreed with the submissions of the Attorney-General in *Attorney-General v. Hertzberg Daniel*<sup>167</sup> that Singapore should retain the test of the “inherent tendency” of speech to interfere with the administration of justice rather than adopting the more liberal “real risk” test applied in other common law jurisdictions which had adopted statutes “defining the right to freedom of expression in terms which are different from our Constitution and/or were parties to treaties that Singapore is not a party to. The AG further pointed out that there was a common observation in some of these jurisdictions that respect for the courts has diminished.”<sup>168</sup> Lai J noted the reason for adopting the real risk test was “essentially the need to protect the right to freedom of speech and expression and the broader test based on ‘inherent tendency’ is considered to inhibit the right to freedom of speech and expression to an unjustifiable degree.”<sup>169</sup> She underscored, in agreement with the AG, that local conditions determined the “acceptable limits” to freedom of speech in tandem with “the ideas held by the courts about the principles to be adhered to in the administration of justice.”<sup>170</sup> The firmer treatment of attacks on judicial integrity was necessitated by “our small geographical size and the fact that in Singapore, judges decide both questions of fact and law.”<sup>171</sup>

Notably, the AG in his arguments referred to Articles 13 and 14 of the non-binding Universal Declaration of Human Responsibilities,<sup>172</sup> which was adopted by a private group, the Interaction Council to underscore limiting the scope of rights by reference to responsibilities. This included “many

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166. *Id.* at 359, para. 100.

167. [2009] 1 SLR 1103.

168. *Id.* at 1114, para. 11.

169. *Id.* at 1125, para. 32.

170. *Id.* para. 33.

171. *Id.*

172. Universal Declaration of Human Responsibilities (Sept. 1, 1997), available at <http://www.interactioncouncil.org/udhr/declaration/udhr.pdf>. Art. 13 relates to the importance of professional codes of ethics which “should reflect the priority of general standards such as those of truthfulness and fairness” while art. 14 underscores that freedom of the media “carries a special responsibility for accurate and truthful reporting.”

elder statesmen” from “modern liberal democracies.” This was to rebut the statement by defence counsel that the law in “other modern liberal democracies” was the standard Singapore should be held to, which was derided as “cultural arrogance.”<sup>173</sup> What might be considered acceptable in England today “does not inevitably mean that they should be deemed acceptable anywhere else in the independent Commonwealth.”<sup>174</sup> English society had become more tolerant of strong language over time, having lost the habit of respect and thus what constituted “scurrilous abuse” in 1900 might not in 1990.<sup>175</sup> Thus, “modern cases from the so-called “Western democracies reflect changes in the values of those societies that do not necessarily reflect the values of Singapore” and should be treated with circumspection as such developments “since Singapore achieved legal emancipation from the British Empire do not necessarily represent progress.”<sup>176</sup>

In relation to speech which criticises judicial impartiality, the AG cautioned “going in the direction of erosion of respect for the courts.”<sup>177</sup> Soft international law was thus highlighted to support an argument on the importance of limiting speech in not protecting unwarranted attacks on the judiciary, to demonstrate that “serious-minded people may legitimately differ about what is acceptable for the functioning of a modern democracy” and that it was for “each society to decide what works in the context of its own societal and cultural value system.”<sup>178</sup> That is, to demonstrate viewpoint diversity and to appeal to a particularist apprehension of social values which determined the importance of speech and judicial reputation.

#### (b) Treaty Law

Following the dualist model, treaties are only domestically enforceable where they have been incorporated by statute. In jurisdictions like India for example, CEDAW has actually been invoked as one of the bases for the judicial declaration of “binding” guidelines on sexual harassment; these directions “would be binding and enforceable in law until suitable legislation is enacted.”<sup>179</sup> The Supreme Court noted that the scope of fundamental

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173. AG’s Submissions (Oct. 31, 2008), AG v. Dow Jones Publ’g Co. (Asia) Inc., para. 5, available at <http://www.agc.gov.sg/docs/WSJAAGSubswithhyperlinks.pdf>.

174. *Id.* para. 6.

175. *Id.* para. 6, quoting from Borrie & Lowe’s *The Law of Contempt* (3d ed.).

176. *Id.* paras. 6, 9.

177. *Attorney-General v. Hertzberg*, [2009] 1 SLR 1103, 1114, para. 11.

178. Modern cases from the so-called “Western” democracies reflect changes in the values of those societies that do not necessarily reflect the values of Singapore. Such modern cases should be treated with circumspection.” AG’s Submissions (Oct. 31, 2008), AG v. Dow Jones Publ’g Co. (Asia) Inc., at 11, para. 9, available at <http://www.agc.gov.sg/docs/WSJAAGSubswithhyperlinks.pdf>.

179. *Vishaka v. State of Rajasthan A.I.R.*, [1997] S.C. 3011 (India). Arts. 11 (workplace discrimination), 24 (adopting national measures) and the general recommendations of the CEDAW Committee on art. 11 were referenced. This laying down of guidelines and norms for “due observance” at all work places “until legislation is enacted for the purpose” was done pursuant to art.

constitutional rights were “of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse” and that “international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them.”<sup>180</sup>

While CEDAW has been invoked in parliamentary discussion, it has yet to be raised in a judicial setting in Singapore. There have been references by courts to CRC where its norms have been approvingly cited where these reiterate domestic rules, such as the idea of joint parental responsibility embodied in Section 46(1) of the Women’s Charter,<sup>181</sup> which Article 18 of the CRC endorsed.<sup>182</sup> This attitude minimises the transformative potential of international law on domestic law and policy.

(c) Monism and Customary International Law

While treaty norms have to be statutorily incorporated to be given domestic legal effect, it appears that the approach towards customary international law is monistic, that is, international law is part of Singapore law without a further act of incorporation, following English practice.

This was recognised in *Nguyen Tuong Van v. Public Prosecutor*<sup>183</sup> in relation to Article 36(1) of the 1963 Vienna Convention on Consular Relations (“VCCR”) which relates to notifying a sending state that one of its nationals has been arrested. Singapore was then, in 2004, not party to the VCCR, but nonetheless the court recognised it as reflecting the “prevailing norms of the conduct between states.”<sup>184</sup> Before the High Court, it had been argued that the VCCR applied to Singapore as it was customary international law; however, the Prosecution’s reply failed to address this, even while

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32 of the Indian Constitution which is concerned with the enforcement of fundamental rights. Further, these guidelines were to be “treated as the law declared by this Court under art. 141 of the Constitution.” *Id.* para. 16.

180. *Vishaka v. State of Rajasthan*, A.I.R., [1997] S.C. 3011, para. 14, available at [http://www.iiap.res.in/files/VisakaVsRajasthan\\_1997.pdf](http://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf).

181. Women’s Charter, (2007) Cap. 353 (Sing.).

182. *CX v. CY (minor: custody and access)*, [2005] S.G.C.A. 37; [2005] 3 SLR 690, 700, para. 26; *UW v. UX* [2007] S.G.D.C. 259, para. 10: “This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. As the Court of Appeal noted, the Women’s Charter (Cap. 353) exhorts both parents to make equal efforts to care and provide for their children. The United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory also encapsulates in art. 18 the universal human value that both parents have common responsibilities for the upbringing and development of their child. There can be no doubt that the welfare of a child is best secured by letting the child enjoy the love, care and support of both parents. The needs of a child do not change simply because the parents no longer live together. Thus, in a custody proceeding, it is crucial for the court to recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child’s life.”

183. *Nguyen Tuong Van v. Pub. Prosecutor*, [2005] 1 SLR 103.

184. *Id.* at 112, para. 24 (“Although Singapore is not a party to the Convention, Singapore does conform with the prevailing norms of the conduct between States such as those set out under art. 36(1) . . .”).

arguing that Article 36 was not breached on the facts.<sup>185</sup> Kan J noted that Singapore subscribed to and followed an established practice of notifying the consular officers of the state of an accused person who had been arrested and this had in fact been done. Such a directive was part of the standard operating procedures of the Central Narcotics Bureau and it was “reasonable to infer” other law enforcement agencies had similar ones.<sup>186</sup> Aside from the Article 36(1) norm being reflected in Singapore law enforcement practice, the Prosecution was positioned to “have knowledge of Singapore’s position on this issue” and “did not assert the contrary.”<sup>187</sup> This was indicative that the directive accepted the obligations set out in Article 36(1) as a matter of customary international law.

(d) Customary Human Rights Law

Arguments to buttress fundamental liberties cases by reference to international customary human rights law (whether putative or actual), have encountered varying degrees of receptivity and resistance before Singapore courts. These usually invoke clauses contained in the UDHR,<sup>188</sup> a UN General Assembly Resolution, which may as a whole, certainly with respect to certain provisions, have the status of customary law.<sup>189</sup>

In articulating various principles of constitutional interpretation to be applied to fundamental liberties in Westminster Constitutions, the Privy Council advocated according a “generous interpretation” which affords individuals the “full measure” of their fundamental liberties,<sup>190</sup> eschewing pedantic literalism or formalism. In particular, the reference to “law” in the Fundamental Liberties Chapter, such as prohibitions against deprivation of life or personal liberty save “in accordance with law” referred to “fundamental rules of natural justice.” The content of this constitutional standard was left open-ended; it was not to be “obviously unfair”<sup>191</sup> and in ascertaining this, the Court should construe the constitutional clause through a broad interpretive palette, including reference to comparative constitutional practices, the administration of justice in civilian systems as well as recourse to international instruments like the UDHR. This suggests that universally applicable principles may be identified and confirmed by global practice.

In *Haw Tua Tau v. PP*, the Privy Council, in evaluating a law which removed the right to make unsworn statements without drawing adverse

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185. Pub. Prosecutor v. Nguyen Tuong Van, [2004] 2 SLR 328, 345, para. 32.

186. *Id.* 346, para. 35.

187. *Id.* paras. 36-37.

188. GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/180 (1948) 71.

189. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1995); Kevin YL Tan, *Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection*, 20 SLR 239, 271 (1998).

190. Ong v. Pub. Prosecutor, [1980-1981] SLR 48, 61C-D.

191. *Haw v. Pub. Prosecutor*, [1981] 2 MLJ 49, 76E-G.

inferences stated that neither the UDHR nor the ECHR contained a rule to the effect “that a person who is standing trial before a court of justice charged with an offence which he does not admit, must not be ordered by the court, under threat of legal sanctions in the event of disobedience, to disclose what he knows about the matter which is the subject of the charge.”<sup>192</sup> It was not necessary in their Lordships’ view to decide that such a rule should be recognised as “a fundamental rule of natural justice under the common law system of criminal procedure,”<sup>193</sup> so as to be a constitutional constraint on legislative provisions. The point to note was the willingness of their Lordships to reference international human rights norms, including those contained in treaties Singapore was not party to (the ECHR) as a source for elaborating the content of “fundamental rules of natural justice.”<sup>194</sup>

After Singapore cut off appeals to the Privy Council in 1994, a certain judicial dismissiveness towards UDHR-based human rights arguments was evident in the rare occasions international law was invoked in constitutional law cases. In *Chan Hiang Leng Colin v. PP*<sup>195</sup> which contained the religious freedom rights of Jehovah Witnesses’ who had been deregistered in Singapore under the Societies Act for refusing to perform military service, arguments that the relevant laws breached the Article 18 religious liberty clause in the UDHR were summarily ignored thus: “I think that the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the [Undesirable Publications Act] UPA alone.”<sup>196</sup>

This parochialism or impatience with international law arguments is no longer dominant in cases heard a decade later, in the 21<sup>st</sup> century, where a more nuanced engagement with international law is evident, even if such arguments have failed to exert any palpable influence on the final decision. There is clearly an appreciation that customary human rights norms that find

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192. “Its non-observance involves no conflict with the undoubted fundamental rule of natural justice stated in art. 6(2) of the Convention: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”; and in many countries of the non-communist world, whose legal systems are not derived from the common law, the court itself has an investigatory role to play in the judicial process for the trial of criminal offences. In such systems interrogation of the accused by a judge, though not direct interrogation by the prosecution, forms an essential part of the proceedings.” *Id.* at 81G-I.

193. *Id.* at 81G.

194. It may be noted that common law jurisdictions show differing degrees of receptivity to international human rights norms, and indeed regional human rights norms. This is a function of the influences informing the drafting of constitutions and quasi-constitutional instruments, history and the human rights treaties acceded to. A useful comparison is two public assembly freedom cases from Singapore and Hong Kong: the former expressly rejects ECHR influenced developments in the common law while the latter embraces it. See *Chee v. Minister for Home Affairs*, [2006] 1 SLR 582, para. 5. *Leung v. Hong Kong Special Admin. Region FACC Nos. 1 & 2 of 2005* (Judgment of July 8, 2005).

195. *Chan v. Pub. Prosecutor*, [1994] 3 SLR 662.

196. *Id.* at 681I-682A.

no counterpart in the Singapore constitution may nonetheless found a justiciable right.

This is most clearly evident in a case involving the imposition of the mandatory death sentence on an Australian foreign national found guilty of drug trafficking offences under the Misuse of Drugs Act. This was unsuccessfully challenged as unconstitutional on grounds of inequality under Article 12, and an alleged contravention of the Article 9 guarantee against the deprivation of life or personal liberty “save in accordance with the law.” In *Nguyen Tuong Van v. PP*,<sup>197</sup> it was argued that the meaning of “law” in Article 9(1) should include Article 5 of the UDHR which provides that: “No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.” From that, it was contended that death by hanging would constitute a cruel, inhuman and degrading method of execution under Article 9(1).

Before the High Court, Kan J noted that the UDHR was not a treaty and there was a lack of consensus as to whether it codified customary international law. In addition, it did not expressly reference hanging.<sup>198</sup> To illustrate dissensus, he cited the US case of *Campbell v. Wood*<sup>199</sup> where the majority decision found that hanging did not violate the cruel and unusual punishment constitutional prohibition. When the matter came before the Court of Appeal, it unequivocally accepted that Article 5 of the UDHR was indeed a customary international law rule, citing the Third Restatement of US Foreign Relations Law as a “useful summary” of customary human rights norms.<sup>200</sup> While accepting the binding status of the rule, the Court of Appeal nonetheless affirmed the High Court’s reasoning with respect to the disputed content of the prohibition against cruel and inhuman treatment. It found “there is simply not sufficient state practice” to establish that death by hanging violates Article 5 of the UDHR. Furthermore, the state of

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197. *Nguyen Tuong Van v. Pub. Prosecutor*, [2004] 2 SLR 328 (H.C.) [*Nguyen* (H.C.)]; [2005] 1 SLR 103 (C.A.) [*Nguyen* (C.A.)]. For an analysis of the case, see Li-ann Thio, *The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in Public Prosecutor v. Nguyen Tuong Van*, 4 OXFORD U. COMMONWEALTH L.J. 213 (2004); Lim Chin Leng, *The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v. Public Prosecutor*, SING J. LEGAL STUD. 218 (2005).

198. Hanging is the method of execution in Singapore: *Nguyen Tuong Van v. Pub. Prosecutor*, [2004] 2 SLR 328, 360, para. 106.

199. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994).

200. [2005] 1 SLR 103, 127, para. 91. A useful summary of generally accepted customary human rights law norms may be found in THE RESTATEMENT OF THE LAW THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (American Law Institute, 1997) which reads: “A state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination or (g) a consistent pattern of gross violations of internationally recognised human rights.”

international law at the time did not conclusively establish a prohibition against the death penalty, as “[t]he number of States retaining the death penalty was almost equal to the number of States that had abolished it” according to a 2002 UN Commission on Human Rights report.<sup>201</sup> Thus, the Courts must be satisfied that any invoked customary international law rule is “clearly and firmly established”<sup>202</sup> before adopting it. Singapore recognises a distinction between “core” universally human rights and “contested” human rights claims<sup>203</sup> and from *Nguyen*, it appears that the evidence or lack thereof to establish a generally accepted human rights standard will be closely scrutinised, in distinguishing legal rights which will as customary human rights norm inform constitutional interpretation, from political claims.

However, even if death by hanging as statutorily mandated was contrary to an accepted customary international law norm, the courts in *Nguyen* were united in holding that domestic statutes, where unambiguous, or rules finally declared by a judicial body, would prevail in the effect of a conflict. This followed English practice, which operated in the context of a supreme Parliament.<sup>204</sup> The operating assumption seems to be that an imported customary international law has the same status as a common law norm.

However, if indeed hanging contravened the Article 5 of the UDHR prohibition against cruel and inhuman punishment, would this international norm be received as part of Singapore common law and subject to statutory overriding? Even if so, what if the relevant international law norm is *jus cogens*,<sup>205</sup> a peremptory norm which no state can contract out of and in

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201. Question of the Death Penalty: Report of the Secretary-General submitted pursuant to Commission resolution 2002/77 UN ESCOR, 59th Sess., UN Doc E/CN.4/2003/106 (2003). [2005] 1 SLR 103, 127-128. Singapore is now leading the defence of capital punishment before the United Nations, evident in a 99 to 52 vote on a resolution seeking a worldwide moratorium on capital punishment: Andy Ho, *UN Moratorium on Capital Punishment: The Moral Case for the Death Penalty*, STRAITS TIMES (Nov. 24, 2007).

202. [2005] 1 SLR 103, 127.

203. As Foreign Minister Wong Kan Seng noted in 1993: “Most rights are still essentially contested concepts. There may be a general consensus. But this is coupled with continuing, and, at least for the present, no less important conflicts of interpretation. Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite gender.” “The Real World of Human Rights,” at the World Conference on Human Rights in Vienna (June 16, 1993); Singapore Government Press Release No. 20/JUN 09-1/93/06/16, reproduced in SING J. LEGAL STUD. 605 (1993).

204. [2005] 1 SLR 103, 128, para. 94 (citing *Cheung v. The King*, [1939] A.C. 160 (U.K.) and *Colloco Dealings Ltd. v. Inland Revenue Comm’r*, [1962] A.C. 1 (U.K.).

205. Generally accepted *jus cogens* norms remain a limited category of hierarchically superior norms, including genocide, piracy, slaving, torture, wars of aggression and the prohibition against the use of force by states. See generally ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2008).

respect of which a conflicting treaty is void.<sup>206</sup> Or, would it be received as part of the Constitution, the supreme law of the land,<sup>207</sup> as a source of law for interpreting and giving substance to a constitutional law right, which would trump inconsistent legislation? If international law is received as part of a higher order constitutional norm, it is hierarchically superior to statutory rules as the Constitution prevails over statute law, which prevails over common law. If the Constitution can be interpreted through the lens of international law in this manner, customary human rights law is in a position to exert more influence over the development of constitutional jurisprudence, and would be enforceable as part of domestic law. This has yet to be judicially addressed.

A final point worth making is that while there is a discernible trend, in the few constitutional cases that are heard within the context of a relatively weak rights-oriented legal culture,<sup>208</sup> of counsel invoking international law in constructing public law arguments, the more compelling enquiry is how international law arguments are being used in this context. In previous cases such as *Colin Chan*, Article 18 of the UDHR was invoked only to underscore or accentuate the gravity or weight of the Article 15 religious liberty constitutional guarantee which found parallel expression in international human rights law. This is not dispositive, but could affect the balancing process in rights adjudication.

Similarly too, in the case of *Re Gavin Millar Q.C.*,<sup>209</sup> international instruments were invoked to buttress two arguments, with varying degrees of sophistication. In a nutshell, the case concerned the application to admit a foreign Queen's Counsel under the regime of the Legal Professions Act before the Singapore bar to hear an allegedly complicated libel case involving senior politicians.<sup>210</sup>

Defence counsel urged the court to reconsider the test of qualified privilege developed by the House of Lords in *Reynolds*<sup>211</sup> and *Jameel*,<sup>212</sup> contending that this right-expansive approach was a product of the common law rather than ECtHR jurisprudence. Counsel argued that "the courts will want to consider the conformity of the common law of qualified privilege as applied in Singapore with the relevant international and constitutional norms."<sup>213</sup> This included Article 19 of the UDHR which safeguarded

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206. Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331.

207. Republic of Singapore Constitution, art. 4, available at <http://statutes.agc.gov.sg/>.

208. See Thio, *supra* note 8, at 210.

209. *Re Gavin Millar Q.C.*, [2008] 1 SLR 297 (H.C.).

210. See Li-ann Thio, *Reading Rights Rightly: The UDHR and Its Creeping Influence on the Development of Singapore Public Law*, SING J. LEGAL STUD. 264 (2008).

211. *Reynolds v. Times Newspapers*, [2001] 2 A.C. 127 (U.K.).

212. *Jameel v. Wall St. Journal Europe*, [2006] 3 WLR 642 (U.K.).

213. Para. 42, Appellant's Case, In the Matter of Section 21 of the Legal Profession Act (Cap. 161) Between Gavin James Millar and Lee Hsien Loong and Lee Kuan Yew, CA70/2007/J (on file



freedom of expression. This invocation seems only to accentuate the weight that ought to be accorded the Article 14 constitutional right of free speech where balanced against reputational interests in political libel cases, without adding to the judicial reasoning process itself.

It was further contended, that since the opposing side had a senior counsel, the court ought to admit the queen's counsel to give due regard to "the need for a level playing field between the parties to the defamation suits."<sup>214</sup> In support of this, Article 10 of the UDHR was invoked as embodying the principle of equality of arms, which was described by the defendants as "a fundamental part of any fair trial guarantee." Article 10 provides that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In such a complex case, "this principle would be breached where there was disparity between the respective levels of legal representation." Two European Court of Human Rights (ECtHR) cases were cited to support this proposition.<sup>215</sup>

The defendants argued that as United Nations member states, Singapore was bound by the United Nations Charter to respect UDHR standards, this being a General Assembly resolution which was recommendatory rather than legally binding at its adoption.<sup>216</sup> The High Court did not decide whether Article 10 of the UDHR embodied customary international law, but assuming it did, why was it invoked within the context of a constitutional law argument?<sup>217</sup>

The Singapore Constitution does not contain an explicit right to a fair trial. Thus, Article 10 of the UDHR was not invoked to inform the content of an existing constitutional right or to emphasise the importance of such a right. Conceivably, Article 10 of the UDHR was invoked to buttress an argument that there was an *implicit* right to a fair trial, drawing from conceptions of the rule of law<sup>218</sup> as a constitutional principle.<sup>219</sup> The

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with author).

214. [2008] 1 SLR 297, 303, para. 3 (H.C.).

215. *De Haes and Gijssels v. Belgium*, 25 EUR. H.R. REP. 1 (1997); *Steel and Morris v. United Kingdom* 41 EUR. H.R. REP. 22 (2005).

216. Today, the *UDHR* is considered an "authoritative statement of the international community." *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

217. Within the context of administrative law, human rights may well be a relevant consideration in the exercise of administrative discretion, as in decisions whether to admit foreign lawyers to the Singapore bar under the Legal Profession Act, (2009) Cap. 161.

218. *Chng v. Minister of Home Affairs*, [1988] SLR 132, 156B.

219. The Law Minister has stated that the right to vote in Singapore was an implied constitutional right, drawn from its system of representative democracy and articles 65 and 66 of the Constitution which provide for General Elections within 3 months after Parliament is dissolved. *Voting in Singapore: A Right or a Privilege?*, TODAY (Sing.) 14-15, at 6 (2009). Implied freedoms derived from a system of representative democracy have been judicially declared in the Australian context. *Australian Capital Television Pty. Ltd. v. Commonwealth*, (1992) 177 CLR 106.

European cases would then be used to formulate the content of a fair trial as encompassing the principle of equality of arms.<sup>220</sup>

Alternatively, if Article 10 of the UDHR is customary human rights law (for which no evidence was presented), it could have been invoked to establish a free-standing or independent civil right, for which there has as yet been no precedent.

#### IV. CONCLUSION

The courts and government in Singapore are increasingly dealing with international law as a facet of political and legal discourse both domestically and before international fora. In terms of the inter-relationship between the Constitution and International Law, the focal point appears to revolve around international human rights law and how this affects constitutional adjudication and mechanisms for protecting treaty-based rights. While Singapore has signed 3 human rights treaties and over 20 ILO Conventions, no comprehensive legislation or dedicated mechanisms have been adopted to implement treaty norms, even if practically, results are achieved which are consistent with international standards. This shows a desire to minimise external scrutiny in deferring to domestic bodies as bearing the chief responsibility for promoting and protecting human rights.

The courts are also demonstrating a marked consciousness of international law, without necessarily embracing all putative international law norms, and indeed, distinguishing and declaring the non-applicability of rights-oriented European regional norms. The judicial position of the supremacy of domestic law over international law (incurring international responsibility for violating international obligations being a separate issue) also reflects nationalist tendencies and point towards the continued insistence on divergent public law values and the particularism of the Singapore constitutional order in relation to rights and freedoms, despite the convergence in practices in the fields of transnational trade and commerce which do affect municipal law in an age of globalisation.

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220. Interestingly, Tay J in discussing the equality of arms principle seemed to focus on the complexity (or otherwise) of the case, rather than the equality of standing between opposing counsel. This is giving substantive content to the principle and implicitly, applying it, either as a relevant consideration in the administrative process, or a right, whether constitutional or common law, which is defeasible rather than absolute. *Re Gavin Millar Q.C.*, [2008] 1 SLR 297, paras. 42-43 (H.C.).

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