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6

Communitarian Rule of Law and the Judicial Articulation of the Right to be Represented in Singapore

JACK TSEN-TA LEE* AND JACLYN L NEO+

INTRODUCTION

In July 2020, Singapore went to the polls to elect a new Parliament and government, in the midst of the COVID-19 outbreak. It was the Republic's fourteenth general election since its independence in 1965, but only the second time in recent history that all parliamentary seats were contested.[1] A total of 11 political parties contested this election,[2] with several newly formed parties adding to those which were more established.[3] At the centre of the electoral contest was the People's Action Party (PAP), which has formed every government in Singapore since independence. In fact, after the opposition party Barisan Sosialis quit Parliament in protest in 1965,[4] the PAP enjoyed a monopoly of seats in Parliament until 1981, when an opposition leader won a seat in a by-election. That, however, did not lead to any radical change in the composition of Parliament, even though the opposition presence has

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[1] R Sim, 'Singapore GE2020: All 93 Seats to be Contested at July 10 Election; 192 Candidates from 11 Parties File Papers on Nomination Day', *The Straits Times* (30 June 2020). Available at: www.straitstimes.com/politics/singapore-ge2020-all-93-seats-to-be-contested-at-july-10-polls-192-candidates-from-11.

[2] Ibid.

[3] F Koh, 'Singapore GE2020: With New Leaders and New Parties, a Much-changed Opposition Gets Ready for Battle', *The Straits Times* (23 June 2020). Available at: www.straitstimes.com/politics/singapore-ge2020-with-new-leaders-and-new-parties-a-much-changed-opposition-gets-ready-for.

[4] Ho AL, 'Opposition MPs Boycott S'pore's First House session', *The Straits Times* (6 December 2015) www.straitstimes.com/singapore/opposition-mps-boycott-spores-first-house-session.

increased over the decades, partly because opposition parties won more seats and partly due to deliberate institutional design on the part of the government to introduce more opposition voices while maintaining the political status quo. In the 2015 general election, the PAP retained its supermajority with 83 out of 89 seats in Parliament and increased its vote share to 69.9 per cent.[5] The key question at each general election has never been *who* is going to form the government, but what the victory margin will be for the PAP.

The state of elections in Singapore poses a fascinating puzzle. While critics may point to the PAP's dominance and laws purporting to restrict freedom of speech, among other things, as indicative of a 'fundamentally undemocratic'[6] regime, others have conceded that Singapore is at least 'semi-democratic'[7] or, grudgingly, 'competitively authoritarian'.[8] Indeed, even though elections have been held regularly since Singapore's independence in 1965, it consistently scores and ranks poorly in various democracy indices. On the Economist Intelligence Unit's Democracy Index, Singapore is consistently classified as a flawed democracy, with concerns raised every year about its legal restrictions on freedom of speech.[9] At the same time, Singapore ranks very highly on rule of law indices. It has ranked first out of 140 countries in terms of the '[e]fficiency of [its] legal framework in settling disputes' by the World Economic Forum.[10] Singapore was also ranked among the top countries worldwide in respect of its fidelity to the rule of law by the World Bank[11] and the World Justice Project.[12] In 2020, the World Justice Project ranked Singapore above the United Kingdom on its Rule of Law Index.[13] In 2016, the International Monetary Fund Chief praised Singapore as an example to be emulated for its eradication of corruption and its

[5] S Tan, 'GE2015: PAP Vote Share Increases to 69.9%, Party Wins 83 of 89 Seats including WP-held Punggol East' *The Straits Times* (12 September 2015). Available at: www.straitstimes.com/politics/ge2015-pap-vote-share-increases-to-699-party-wins-83-of-89-seats-including-wp-held-punggol.

[6] S Reyes, 'Singapore's Stubborn Authoritarianism' *Harvard Political Review* (29 September 2015) Available at: https://harvardpolitics.com/world/singapores-stubborn-authoritarianism/.

[7] W Case, 'Singapore a Stable Semi-democracy' in *Politics in Southeast Asia: Democracy or Less* (2002), 81.

[8] S Ortmann, 'Singapore: Authoritarian but Newly Competitive' (2012) 22(4) *Journal of Democracy* 153.

[9] 'Asia Remains Stagnant in the Democracy Index 2019', *The Economist* (27 January 2020), https://country.eiu.com/article.aspx?articleid=538983237&Country=Singapore&topic=Politics&subtopic=Forecast&subsubtopic=Democracy+index.

[10] K Schwab (ed), *The Global Competitiveness Report 2015–2016* (Geneva: World Economic Forum, 2015), 321. Available at: www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf.

[11] 'Worldwide Governance Indicators: Country Data Report for Singapore, 1996–2014', *World Bank* (15 September 2015). Available at: http://documents1.worldbank.org/curated/en/666041467993465894/pdf/105564-WP-PUBLIC-Singapore.pdf.

[12] 'WJP Rule of Law Index: Singapore', World Justice Project (2020). Available at: https://worldjusticeproject.org/rule-of-law-index/country/2020/Singapore/.

[13] World Justice Project Rule of Law Index 2020,World Justice Project, 2020, 7. Available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

establishment of honest and competent public institutions.[14] Others, however, argue that what Singapore has is not the rule of law, but rule by law.[15]

The discrepancy between how Singapore ranks in terms of the rule of law vis-à-vis democracy raises a fascinating puzzle. How does a country rank so highly on rule of law indexes but score so poorly on democracy indexes? More importantly, what does this say about the relationship between the rule of law and democracy? The first puzzle is probably easier to address and the clue lies in the factors used in how the rule of law indexes were compiled and scored. Singapore scores very highly on rule of law indexes that take into account a wide range of indicators that go beyond those used in democratic indexes. On the World Justice Project's Rule of Law Index, for instance, it comes at or near the top of the table on order and security, non-corruption, civil justice, criminal justice, as well as regulatory enforcement, but not so high on other aspects such as constraints on government powers, openness of government and fundamental liberties. On one level, therefore, the discrepancies could be said to reflect an old debate about the meaning and content of the rule of law. Indeed, scholarship parsing through these is plentiful and has become a small cottage industry unto itself. Martin Krygier highlights how the concept has evolved from a 'controversial legal ideal' to an 'opposed international cliché/slogan'.[16] Melissa Curley, Björn Dressel and Stephen McCarthy point to the deeply contested and politicized nature of the discussion on the rule of law.[17] Jeremy Waldron famously called the rule of law an essentially contested concept.[18]

Distinctions are commonly drawn between formal and substantive concepts of the rule of law,[19] or alternatively, between thin and thick senses of the rule of law.[20] Within this discourse, the question of whether individual rights protection should be considered part of the rule of law has become a critical flashpoint. Indeed, critics argue that restrictions on freedom, especially freedom of speech, association and assembly, are often an indicator of an insufficiently democratic system. Jothie Rajah characterise Singapore as a country that employs an authoritarian form of the rule of law.[21] She presents an analysis of authoritarian

[14] 'IMF Chief Cites Lee Kuan Yew's "Zero-tolerance" Stance towards Corruption as Example for Rest of World', *Today* (12 May 2016). Available at: www.todayonline.com/world/imf-chief-cites-lee-kuan-yews-zero-tolerance-policy-towards-corruption-example-rest-world.

[15] For a discussion situated within the rule of law v. rule by law debate, see G Silverstein, 'Singapore: The Exception that Proves Rules Matter', in T Ginsburg and T Moustafa (eds) *The Politics of Courts in Authoritarian Regimes* (2008), 73–101.

[16] M Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 *Annual Review Law & Social Science* 199.

[17] See, for example, M Curley, B Dressel and S McCarthy, 'Competing Visions of the Rule of Law in Southeast Asia: Power, Rhetoric and Governance' (2018) *Asian Studies Review* 1.

[18] J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law & Philosophy* 137.

[19] See, for example, B Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004).

[20] See, for example, Thio LA, 'Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore' (2002) 20(1) *Pacific Basin Law Journal* 1–76.

[21] J Rajah, *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore* (2012).

legalism, showing how prosperity, public discourse and a rigorous observance of legal procedure have enabled a reconfigured rule of law such that liberal form encases illiberal content. This disagreement is not merely a dispute among academics or theorists. The 'rule of law' has become a useful and desirable label for governments seeking international approval. Thus, Brian Tamanaha has cautioned that 'rampant uncertainty' raises the risk that the rule of law 'might devolve to an empty phrase' that could be instrumentalised and 'proclaimed with impunity by malevolent governments'.[22]

Common among rule of law indicators is the quality of the judiciary. Without a doubt, the judiciary in Singapore is extremely well regarded for the quality of its doctrinal analysis, its efficiency and uncorrupted reputation. At the same time, critics have argued against what they perceive as a pro-establishment stance in public law cases.[23] This, however, presents an insufficiently nuanced view of the judiciary. The Singapore judiciary has, in recent times, contributed to a thicker conception of the rule of law, alongside an emphasis on Westminster constitutionalism, separation of powers and its co-equality with the political branches of government. In addition, the court has started to articulate a theory of representative democracy that seeks to balance the right to be represented with competing interests rooted in a communitarian conception of democracy. This judicial articulation is significant, as it demonstrates a shift in judicial philosophy towards greater engagement with constitutional issues, instead of employing notions of justiciability in order to not decide such issues. There has been a move towards a constitutional rule of law, albeit a nascent one that is constrained by a communitarian approach to politics. Communitarianism is a multi-faceted theory which, at its core, posits that there are 'common formulations of the good' and the good is not left to be determined by individuals by and for themselves.[24] Beyond this, there is significant disagreement, not least with 'liberal communitarians' seeking to distinguish themselves from what they consider to be more 'authoritarian' strains of communitarianism, which arises when states employ the common good to suppress individual rights.[25] For our purposes, we employ the term communitarian democracy to refer to a political philosophy that sees democracy as serving the common good and emphasizes a more consensual form of politics that prioritizes social solidarity.[26]

This chapter will examine three cases concerning the right to be represented in Singapore, employing them as useful devices to consider some of the more thorny

[22] Tamanaha, n 19 above, 114.

[23] For example, R Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' (2002) 28(4) *Journal of Law & Society* 490.

[24] A Etzioni, 'Communitarianism revisited' (2014) 19(3) *Journal of Political Ideologies*, 241, 242.

[25] Ibid, 244–245.

[26] For more on communitarianism in Asia, see Daniel Bell, 'Communitarianism' Stanford Encyclopedia of Philosophy (4 October 2001, rev. 21 March 2016). Available at https://plato.stanford.edu/entries/communitarianism/.

issues concerning the relationship between the rule of law and democracy in a communitarian dominant party state like Singapore.

CONTESTED CONCEPTS OF THE RULE OF LAW IN SINGAPORE

A Communitarian Rule of Law

The idea that Singapore practises a communitarian rule of law has been articulated by the Government as well as by judges in extra-judicial speeches. In a 2016 speech delivered by Chief Justice Sundaresh Menon at the American Law Institute's 93rd Annual Meeting, he observed that Singapore's 'fidelity to the rule of law' coexists with 'an emphasis on communitarian over individualist values'.[27] This emphasis includes a preference for 'dialogue, tolerance, compromise and placing [of] the community above self'. As he further observed, '[t]hese values have modulated the court's approach in ensuring that the rule of law rules'.[28] This focus on communitarianism adds another layer of complexity to the idea of the rule of law in Singapore, which had for some time focused on formal or procedural aspects. For instance, in 1999, in response to a parliamentary motion by an opposition member, a Government Minister sketched out a procedural idea of the rule of law, rejecting the opposition member's more substantive claims. The Minister stated that the rule of law:

> […] refers to the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notions of the transparency, openness and prospective application of our laws, observation of the principles of natural justice, independence of the Judiciary and judicial review of administrative action.[29]

Lee observes that in subsequent years the government's attitude towards the rule of law shifted from a more procedural idea of the rule of law to one that is not quite focused on human rights, but is nonetheless richer.[30] For example, in its response to a 2008 report on the state of human rights, democracy and the rule of law in Singapore by the International Bar Association Human Rights Institute,[31] the government drew a link between the rule of law and certain

[27] S Menon, 'The Rule of Law: The Path to Exceptionalism' (2016) 28 *Singapore Academy Law Journal* 413.

[28] Ibid, para 24.

[29] Ho PK (Minister of State for Law), 'Rule of Law', *Singapore Parliamentary Debates, Official Report* (24 November 1999), vol. 71, col. 592. See, generally, JTT Lee, 'Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore' [2012] *Singapore Journal of Legal Studies* 298, 319–320.

[30] Lee, ibid, 326.

[31] *Prosperity versus Individual Rights? Human Rights, Democracy and the Rule of Law in Singapore* (London: International Bar Association, 2008). Available at: www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-C4DA-473B-943A-DD0FC76325E8.

substantive values. It stated that the fundamentals for Singapore's success include '[f]ree and fair elections held regularly' and '[a] free society where individual human dignity is protected'.[32] At the same time, the government argued that '[t]he reality is that there are often situations where the pursuit of one norm conflicts with another and decisions have to be taken on the appropriate balance to be struck between them'.[33]

This conception of the rule of law in Singapore 'favours communitarian values over individual rights'.[34] It is no longer a thin or formal view that merely requires observance of the law and a system of judicial oversight, but one that recognises the need to embrace representative democracy and 'human dignity' within the doctrine (though the implications of the latter remain uncertain). Yet the protection of fundamental liberties or human rights is not a lexically prioritized aspect of the rule of law. Instead, it is implied that when public interests such as economic growth and public order clash with individual rights, the latter will be outweighed by the former.[35] The Law Minister has said that the rule of law should be applied 'with hard-nosed practicality',[36] so as 'to achieve good governance and to promote the general welfare'.[37]

It seems evident that the judiciary also aligns with this view. Extra-judicially, Chief Justice Menon explained that within the 'communitarian rule of law', the judiciary is independent but 'plays a supporting role to good governance by articulating clear rules and principles by which the Government should abide, and serving as the last line of defence if and when those principles are breached'.[38] He further explained that 'a court which is respected by the other branches of government can effectively shape the debate and ensure the legality of government actions by setting out its concerns openly and potentially obviating a binary clash between the Judiciary and the Executive'.[39]

[32] 'Singapore's Response to the International Bar Association's Report on Singapore', annexed to a letter (reference no LAW/06/021/026) dated 14 November 2008 from Mark Jayaratnam, Deputy Director, Legal Policy Division, Ministry of Law, to the Chairman of the Human Rights Institute Council of the International Bar Association. Available at: http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=gDkKt5ebvTY%3d&tabid=204, paras 22 and 32.

[33] Ibid.

[34] Lee, n 29 above, 326.

[35] Thio LA, 'Rule of Law within a Non-liberal "Communitarian" Democracy: The Singapore Experience' in R Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (2004), 183, 208 (regarding the Government's approach as a "competing 'thick' version [of the rule of law] fashioned after an illiberal model which prioritises statist goals like economic growth and social control by a relatively incorrupt government").

[36] K Shanmugam, 'The Rule of Law in Singapore' [2012] *Singapore Journal of Legal Studies* 357, 358.

[37] Ibid, 357.

[38] Menon, n 27, para 25, citing Chan SK, 'Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students' (2010) 22 *Singapore Academy of Law Journal* 469, para 29.

[39] Menon, n 27, above, para 29.

This echoes the opinion of former Chief Justice Chan Sek Keong that the Singapore judiciary takes a 'green-light' view of judicial review where the courts are not 'the first line of defence against administrative abuses of power: instead, control can and should come internally from Parliament and the Executive itself in upholding high standards of public administration and policy'.[40] This is preferred to a 'red-light' view, where the courts are 'locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power'.[41]

THE RULE OF LAW'S RELATIONSHIP TO DEMOCRACY WITHIN SINGAPORE

The relationship between the rule of law and democracy is not always clear. It is possible to differentiate between the two, though they may at times be conflated. Furthermore, some may see it as complementary and mutually reinforcing, while others point out that they can frequently be in conflict with one other. Waldron suggests that the rule of law is part of a 'constellation' of mutually reinforcing ideals, which include democracy, human rights, economic freedoms, good governance and development.[42] In Tamanaha's view, the formal version of the rule of law adds democracy to formal legality, that is, as part of the understanding of the rule of law. In this regard, the two have an intrinsically co-legitimating function. As he puts it:

> Without formal legality democracy can be circumvented (because government officials can undercut the law); without democracy formal legality loses its legitimacy (because the content of the law has not been determined by legitimate means).[43]

The exact relationship is complex; the rule of law could serve to reinforce majority rule, while also supporting limits on it.[44] Others have claimed a causal relationship in what Gordon Silverstein calls the 'economic engagement-rule of law process', which sees the rule of law in the form of judicialisation as translating economic incentives into political and social liberalisation. Silverstein, however, cautions against this assumption, pointing to Singapore (among other

[40] Chan, n 38 above, para 29.

[41] Ibid. Chan, who was Chief Justice of Singapore between 2006 and 2012, adopted the red-light/green-light terminology from: C Harlow and R Rawlings, *Law and Administration* (3rd edn) (2009). Chan's preference for the green-light view was cited with approval by the Court of Appeal in *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at paras 48–50 and *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at para 93 (CA); and by the High Court in *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at para 123.

[42] J Waldron, 'The Rule of Law and the Importance of Procedure' in JE Fleming (ed), *Getting to the Rule of Law* (2011), 3, 8.

[43] Tamanaha, n 19 above, 99.

[44] I Salevao, *Rule of Law, Legitimate Governance & Development in the Pacific* (2005), 3.

jurisdictions) as an example where this assumed trajectory had not taken place.[45] Instead, there is an increasingly confident articulation of a democracy that is less defined by liberal rights, but by a more communitarian outlook that values political stability and social cohesion.[46] There is a coalescing of communitarian democracy with the rule of law, Singapore style.

JUDICIAL ARTICULATION OF THE RIGHT TO BE REPRESENTED

The Case of Vellama: Articulating the Right to be Represented

The occasion for judicial engagement with the idea of representation and democracy in Singapore came in the wake of a casual vacancy that arose in a Single Member Constituency (SMC), one of the two types of electoral divisions in Singapore. The elected members of Singapore's unicameral Parliament are chosen by the electorate in a 'first-past-the-post' system either through SMCs in which each voter casts a ballot for an individual candidate, or through Group Representation Constituencies (GRCs) in which a ballot is cast for a group of candidates contesting as a team.

The parliamentary seat in question had fallen vacant after its Member of Parliament (MP) was expelled from his political party. According to Article 46(2)(b) of the Constitution,[47] which is an anti-hopping provision, when a Member of Parliament is expelled from the party under the banner of which he/she stood for election, the seat becomes vacant.[48] The Prime Minister, who was asked in Parliament when he was going to call a by-election to fill the seat, answered that while he intended to do so, he had not decided on the date and that, in any case, the 'timing of the by-election is at the discretion of the Prime Minister'.[49] He further asserted that:

> The Prime Minister is not obliged to call a by-election within any fixed time frame. This absence of any stipulated time frame is the result of a deliberate decision by Parliament to confer on the Prime Minister the discretion to decide when to fill a Parliament vacancy.[50]

According to the PM, his decision would depend on 'all relevant factors including the well-being of [the constituency's] residents, issues on the national agenda, as

[45] See G Silverstein, 'Globalisation and the Rule of Law: "A Machine that Runs of Itself?"' (2003) 1(3) *International Journal of Constitutional Law* 427.

[46] See, generally, Thio, n 35 above.

[47] Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep).

[48] Article 46(2)(b) states: 'The seat of a Member of Parliament shall become vacant – […] if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election'.

[49] Lee HL (Prime Minister), 'By-election in Hougang' *Singapore Parliamentary Debates, Official Report* (9 March 2012), vol 88, 2426.

[50] Ibid.

well as the international backdrop which affects our prosperity and security'.[51] This argument was particularly controversial because the constituency seat was one of a handful that were in opposition hands.

A voter in the constituency filed an application for judicial review, seeking the court's assistance to declare that the Prime Minister had to call a by-election to fill the vacancy. In *Vellama d/o Marie Muthu v Attorney-General*,[52] the High Court held in the government's favour but was overruled by the Court of Appeal. The judgments diverged not only in interpretive approaches, but also in their conceptions of democracy. In its judgment, the High Court took a formalistic approach, which affirmed the Prime Minister's position that there was no constitutional requirement for him to call a by-election to fill a casual vacancy.[53] The issue turned on the interpretation of Article 49(1) of the Constitution which stated that a vacancy 'shall be filled by election'. The High Court held that this referred to 'the process of how this vacancy is to be filled and not the event of an election'.[54] Part of the reasoning hinged on the fact that there are three types of MPs: elected MPs, Non-constituency Members of Parliament (NCMPs) and Nominated Members of Parliament (NMPs). NCMPs are opposition members who did not win seats during the general election, but are nonetheless offered seats in Parliament because they attained the highest percentage of the votes in the constituencies they contested. Their number is currently capped at 12. NMPs are nominated members who are non-partisan and who are selected based on achievements in their fields and are meant to contribute to the diversity of voices in Parliament. Both the NCMP and NMP schemes were introduced by the PAP Government to introduce political plurality in the parliamentary chamber, but without affecting the political status quo. In particular, the government acknowledges that the NCMP scheme serves to give the electorate the assurance that they can safely vote for the PAP because there will always be opposition voices in Parliament under the scheme.[55]

Thus, the High Court held that the constitutional requirement that a vacant seat 'shall be filled by election' only means that the particular seat is not to be filled by any other means, for example, by nomination. The Court was reinforced in this view by the contrast between the phraseology in Article 49(1) and Article 66, which deals with when general elections are to be called. Article 66

[51] Ibid.

[52] *Vellama d/o Marie Muthu v AG* [2012] 4 SLR 698 (*Vellama* (HC)).

[53] Ibid, para 115.

[54] Ibid, para 80.

[55] Remarks to this effect were made during the campaigning period of the 2020 general election: see, for example, D Cheong, 'Singapore GE2020: PAP Will Not have "Blank Cheque" because of NCMP Scheme, say Chan Chun Sing and Indranee Rajah', *The Straits Times* (2 July 2020). Available at: www.straitstimes.com/politics/singapore-ge2020-pap-will-not-have-blank-cheque-because-of-ncmp-scheme-say-chun-sing-and; L Lai, 'Singapore GE2020: Workers' Party Using Fear of Opposition Wipeout to Sway Voters, says Heng Swee Keat', *The Straits Times* (5 July 2020). Available at: www.straitstimes.com/politics/singapore-ge2020-workers-party-using-fear-of-opposition-wipeout-to-sway-voters-says-heng.

states: 'There *shall be a general election* at such time, within 3 months after every dissolution of Parliament, as the President shall, by Proclamation in the *Gazette*, appoint.' The reference in Article 49 to *election* rather than *an election*, the Court reasoned, compared to *a general election* in Article 66, suggested that Article 49(1) referred to the process by which a casual vacancy was to be filled rather than the event of holding an election.[56]

The judgment notably did not examine the rationales for democratic representation. Observing that '[j]udicial review is founded on the rule of law',[57] the Court made reference to passages affirming that the principle of the rule of law entails that 'all legal power has limits and is subject to judicial review to enforce those limits'.[58] Despite these references, the High Court nonetheless endorsed the Prime Minister's view that he is not subject to any constitutional limits or obligations when it comes to deciding when to call by-elections.

In contrast, the Court of Appeal held that the Prime Minister is, in fact, under a constitutional obligation to call by-elections though he retains broad, good-faith discretion to do so within a reasonable time. It disagreed with the High Court's interpretation of Article 49(1):

> Even reading the word 'election' in the context as prescribing only a process, we fail to see how that necessarily leads to the conclusion that the Prime Minister has thereby an unfettered discretion as to whether he will tender advice to the President to issue a writ of election.[59]

The Court of Appeal further argued that the High Court had not considered the possibility that the phrase *shall be filled by election* could be read in a 'double-barrelled sense', such that it was both mandatory for the Prime Minister to fill a casual vacancy that had arisen in Parliament and to do so by way of election.[60] In other words, the Court of Appeal recognised that a purely literal interpretation of the provision did not lead to any particular conclusion as to the issue at hand.[61]

[56] *Vellama* (HC), n 52 above, paras 57–61.

[57] Ibid, para 2.

[58] Thio LA, *A Treatise on Singapore Constitutional Law* (2012) at para 03.026, cited in *Vellama* (HC).

[59] *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at para 75 (CA) ('*Vellama* (CA)'). The Court of Appeal said: 'Whether we construe the word "election" as a process or an event, the [question as to whether the Prime Minister has the discretion not to call for a by-election] still remains. It seems to us that the omission of the word "an" in the phrase "shall be filled by election" ('the phrase') is neither here nor there.' Ibid.

[60] Ibid, para 76.

[61] This is a remarkable departure from formalism and strict interpretivism, which had characterized many of the earlier decisions by the Singapore courts in constitutional cases. For a critique on formalistic approaches in Singapore, see Yap PJ, 'Uncovering Originalism and Textualism in Singapore' in JL Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (2017), 117–136.

The Court of Appeal's holding was hailed as a robust affirmation of the right of representation in Singapore. The Court articulated a link between representation and Westminster-style constitutionalism. The most important passage in the judgment is this:

> Having regard to the role of an MP in the Westminster form of government and on a plain reading of Art 49, it seems clear to us that the Constitution places a duty upon the Prime Minister to call a by-election (unless he intends to dissolve Parliament in the near future) to fill casual vacancies of elected MPs which may arise from time to time.[62]

This reference to the Westminster form of government points to the British model of parliamentary democracy, which Singapore inherited from its British colonials. It envisages a form of government which emphasizes the important role of each MP. As the Court explained, an MP 'represents the people of the constituency who voted him into Parliament', therefore voters of each constituency are 'entitled to have a Member representing and speaking for them in Parliament'.[63] The constitutional duty to call a by-election is imperative because '[i]f a vacancy is left unfilled for an unnecessarily prolonged period that would raise a serious risk of disenfranchising the residents of that constituency'.[64]

Comparing the two judgments, the idea of the rule of law has been invoked in such divergent ways that it is hard to determine what actual normative force it serves. The High Court's conception of the rule of law is vindicated through formal adherence to the constitutional text and even through an emphasis on ensuring the 'right' process is followed. Like the High Court, the Court of Appeal also emphasised the role of the rule of law, stating that it is 'a basic proposition of the rule of law that all discretionary power is subject to legal limits'.[65] However, it took the normativity of the rule of law differently, holding that this therefore means the Prime Minister's discretion as to when a by-election should be held is subject to judicial review. Furthermore, while Article 49(1) does not set out any time limit within which a by-election must be conducted, the rule of law eschews absolute discretion and therefore a reasonable time requirement would be imposed, having regard to all the circumstances.[66]

Another aspect of disagreement lies in the divergent conceptions of representation. While the High Court appeared to see representation as primarily a way to elect the government, the Court of Appeal saw elections as protecting the representative link and the right of voters in the constituency to be represented in Parliament. Thus, one might see the Court of Appeal's approach as tending

[62] *Vellama* (CA), n 59 above, para 82.
[63] Ibid, para 79.
[64] Ibid, para 85.
[65] Ibid, citing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at para 86 (CA).
[66] *Vellama* (CA), n 59 above, para 84, citing the Interpretation Act (Cap 1, 2002 Rev Ed), s 52: 'Where no time is prescribed or allowed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.'

towards a more robust and protective idea of representative democracy, which is nonetheless balanced against communitarian considerations. One can see this, for instance, in the Court of Appeal's caveat:

> As the timing for the holding of an election to fill a vacancy is a polycentric matter which would involve considerations which go well beyond mere practicality and the Prime Minister could justifiably take into account matters relating to policy, including the physical well-being of the country, it is impossible to lay down the specific considerations or factors which would have a bearing on the question as to whether the Prime Minister has acted unreasonably for not, to date, calling a by-election to fill a vacancy.[67]

Accordingly, the Court would only be prepared to intervene in 'exceptional cases',[68] as it appears to balance the right to be represented against the need to maintain social and political stability.

Communitarian Democracy and the Group Representation Constituency: The Case of Wong Souk Yee

One might also understand the Court of Appeal's decision in a subsequent case through this communitarian lens. The case of *Wong Souk Yee v Attorney-General*,[69] an appeal from the High Court,[70] arose when one MP resigned her parliamentary seat to contest the 2017 presidential election. She was part of a GRC, which serves to ensure minority representation by requiring that at least one of the parliamentarians in the team is from the Malay, Indian, or some other minority community in Singapore.[71] While the GRC scheme was instituted through a constitutional amendment, the procedure for filling a vacancy in a GRC is provided for by statute. The Parliamentary Elections Act (PEA)[72] states that no by-election needs to be held 'unless all the Members for

[67] Ibid, para 85. The Court mentioned transboundary haze and, presciently given the current COVID-19 pandemic, a public health concern such as severe acute respiratory syndrome (SARS) as factors that would possibly warrant the Prime Minister postponing a by-election: para 84.

[68] Ibid, para 85.

[69] *Wong Souk Yee*, n 41 above.

[70] *Wong Souk Yee v Attorney-General* [2018] SGHC 80 (HC).

[71] Singapore Constitution, n 43 above, art 39A(1) (which declares the GRC scheme to be 'in order to ensure the representation in Parliament of Members from the Malay, Indian and other minority communities') and arts 39A(2)(a)–(b); Parliamentary Elections Act (Cap 218, 2011 Rev Ed) ('PEA'), ss 27A(4)–(8). The President, acting on the Cabinet's advice, declares before an election which GRCs must have at least one MP from the Malay community and which must have at least one from the Indian or other minority communities: PEA, ibid, s 8A(1)(b). Three-fifths (or, if that is not a whole number, the next higher whole number) of all GRCs must have at least one Malay MP: PEA, ibid, s 8A(3). For general commentary on the GRC scheme, see Thio LA, 'The Right to Political Participation in Singapore: Tailor-making a Westminster-modelled Constitution to Fit the Imperatives of "Asian" Democracy' (2002) 6 *Singapore Journal of International & Comparative Law* 181; and TT Hang, 'Singapore's Electoral System: Government by the People?' (2008) 28(4) *Legal Studies* 610.

[72] PEA, ibid.

that constituency have vacated their seats'[73] in the midst of a parliamentary term. This raises difficult questions about the proper interpretive relationship between a supreme constitution, which contains more general texts and an ordinary statute, which contains more specific provisions governing a particular situation. The Constitution, as we saw earlier, provides at Article 49(1) that vacancies 'shall be filled by elections'. But the statute says that this is only if all the seats in the GRC have become vacant.

This was the issue that the Singapore courts had to grapple with in this case. The appellant, a resident of the constituency who had stood for election at the 2015 general election, argued the statutory provision was unconstitutional and sought to constitutionally oblige the Prime Minister to call for a by-election to fill the vacant seat or, alternatively, to fill all the seats in the GRC. The High Court decided against the applicant. This time the Court of Appeal agreed with the High Court's ruling but disagreed on the reasoning. While conceding there is a discrepancy between the texts, the Court of Appeal noted that when Article 49(1) was enacted in 1965, the concept of GRCs did not exist, therefore how the article applied to GRCs was unclear. Indeed, both sides agreed that there must have been a legislative oversight when drafting the constitutional amendments which implemented the GRC scheme. The parliamentary debates concerning the GRC scheme indicated that it had never been the government's intention for a by-election to be called unless all the seats in a GRC had been vacated. However, the debates were unclear as to how Parliament had intended to implement its intention.[74]

The appellant argued that the article should be interpreted as requiring a by-election for all the seats in a GRC whenever any vacancy arises. The Court was very uneasy with this suggestion as there was no mechanism by which it could force the resignation of the remaining MPs in the team. In the end, it adopted the government's interpretation that Article 49(1) had no application to GRC seats as the words *seat of a Member* in that provision refer only to the seat of an MP of an SMC.[75] This was also in line with Parliament's intention when it established the GRC scheme, whereas the appellant's interpretation would have led to the precise result that legislators had sought to avoid.[76]

As regards the appellant's point that the minority representation rationale underlying the GRC scheme would be undermined if, as had happened in this particular constituency, it is the minority MP's seat which is vacated and not filled through a by-election,[77] the Court noted that this had been considered by Parliament and it had decided that a diminution in the proportion of minority representation in Parliament was 'an acceptable trade-off' to prevent one MP

[73] Ibid, s. 24(2A).
[74] *Wong Souk Yee*, n 41 above, paras 49–56.
[75] Ibid, para 58.
[76] Ibid, paras 70–73.
[77] Ibid, para 74.

in a GRC from being able to hold the other MPs to ransom, for example, by threatening to resign his or her seat, thus forcing a by-election. If the appellant's preferred interpretation of Article 49(1) was adopted, the Court would be reversing Parliament's policy choice. This 'strikes at the heart of the concern behind judicial legislation, and would result in our overstepping our constitutional role'.[78]

In the reasoning set out thus far, the Court of Appeal focused on construing the constitutional text in the light of Parliament's intention in enacting the GRC scheme in 1988 and did not expressly have regard to any rationale for democratic representation. However, it did allude to the latter point when responding to one of the appellant's arguments. The appellant had relied on the Court's statement in *Vellama* that '[t]he voters of a constituency are entitled to have a Member representing and speaking for them in Parliament',[79] and the fact that in the later case of *Yong Vui Kong v Public Prosecutor*[80] the Court had said this articulation of the Westminster model of government provided the 'philosophical underpinnings of the right to vote'[81] which might possibly be 'part of the basic structure of the Constitution'.[82] On this basis, the appellant submitted that the Constitution's basic structure also embodies the right of voters to be represented in Parliament and that this right includes the right to be represented by the full complement of elected MPs returned at each general election. Thus, if a vacancy in a GRC remained unfilled, an aspect of the Constitution's basic structure had been violated.[83]

It is significant that the Court did not dismiss outright the possibility that such a right of representation might be implied into the Constitution. It noted that the Court had not yet conclusively held whether the basic structure doctrine as articulated in *Kesavananda Bharati v State of Kerala*[84] applies in Singapore – that is, in a way that obliges the courts to invalidate purported constitutional amendments inconsistent to the Constitution's basic structure. Assuming, though, the right to representation is part of the basic structure, this did not mean there is a particular form of representation that is 'fundamental and essential' to the Westminster model of government and which cannot be modified. There was nothing in principle preventing Parliament from allowing a GRC to be represented by fewer than its full complement of MPs if some of them had vacated their seats.[85]

Nonetheless, the Court expressed the opinion that if *all* the seats in a GRC fell vacant, it did not necessarily mean that the Prime Minister was not

[78] Ibid, para 75.
[79] *Vellama* (CA), n 59 above, para 79.
[80] [2015] 2 SLR 1129 (CA).
[81] Ibid, para 70.
[82] Ibid, para 69.
[83] *Vellama* (CA), n 59 above, para 76.
[84] AIR 1973 SC 1461 (SC, India).
[85] *Vellama* (CA), n 59 above, para 78.

constitutionally (rather than statutorily) obliged to call a by-election. In this scenario, it was 'at least arguable that an implied right to representation might be invoked to fill this lacuna in the Constitution', though obviously it would be more desirable if Parliament amended the Constitution to deal with the situation instead.[86]

Interestingly, in the later case of *Daniel De Costa Augustin v Attorney-General*,[87] an unsuccessful attempt to challenge the holding of the 2020 general election in the midst of the COVID-19 pandemic, the Court confirmed that the right to vote is 'plainly a constitutional right'[88] which is 'best understood as a right that is found in the Constitution either as a matter of construing it in its entirety or as a matter of necessary implication' from certain constitutional provisions.[89] The Court also accepted 'as a statement of principle elections must be free and fair',[90] but held the appellant had not presented an arguable case as to what this requires, how the aspects of the principle attract constitutional status and how a breach was threatened on the facts of the case.[91]

Right to be Represented, but How?

Arguably, the holding in *Wong Souk Yee* that the right of representation tolerates a sub-optimal level of democratic representation in GRCs detracts from a substantive conception of the rule of law, which would require individual rights to be guaranteed. This assumes, though, that one emphasises the substantive conception, which has never been accepted in Singapore. Instead, the judiciary has affirmed that the right to be represented is constitutionally protected, but not necessarily in specific ways that could be contrary to social and political stability. The Court of Appeal's acceptance of the government's argument that by-elections should not be required unless all the seats in a GRC are vacated lest one or some of the MPs use the threat of resignation to hold the others to ransom serves the aim of not disrupting the political status quo.

Accordingly, there is a right to be represented, but the mechanics of representation are not certain. We know from *De Costa* that the right to vote, which is implied in the Constitution, requires a free and fair election, but what the latter means has yet to be worked out. As such, the precise form of democracy is still in flux in Singapore, though communitarianism is clearly part of the equation.

[86] Ibid, para 72.
[87] [2020] SGCA 60 (CA).
[88] Ibid, para 10.
[89] The Court identified art 66 which requires a general election to be held within three months of a dissolution of Parliament and art 39(1)(a) which states that Parliament consists of, among others, 'such number of elected Members as is required to be returned at a general election': see *De Costa*, ibid para 9.
[90] *De Costa*, ibid, para 13.
[91] Ibid, para 14.

What we might see is a periodic renegotiation of the balance between the right to be represented against the communitarian interests of political and social stability, framed through the lenses of the rule of law and democracy.

Even while the cases have not embraced a substantive version of the rule of law, the courts have definitely advanced a thicker procedural idea of the rule of law. In *Wong Souk Yee*, the Court of Appeal made two procedural rulings that underscore the rule of law's role in upholding representative democracy. The High Court had dismissed the appellant's application for leave to bring judicial review proceedings on the ground that it failed to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought. Disagreeing, the Court of Appeal noted that the threshold for granting leave is low since the requirement for leave is only intended to 'filter out groundless or hopeless cases at an early stage'.[92] The appellant had met the threshold.[93]

The Court of Appeal also set aside the High Court's order that the appellant should pay costs to the respondent. It held that where a serious question of constitutional law is raised, courts have discretion to depart from the usual rule that costs follow the event. By emphasising that the threshold for granting leave for applications for prerogative orders is low and holding that in cases where serious constitutional law questions are raised an unsuccessful applicant may not be required to bear the government's legal costs, the Court thus signalled that appropriate challenges seeking to uphold democratic representation will not be turned away.

CONCLUSION

We have seen that the Singapore courts have relied on the concept of the rule of law in a way supportive of the right to be represented. However, they have developed this right within the specific contexts in Singapore, particularly framed by the idea of a 'communitarian rule of law'. This has meant that the approach sits on the tightrope of ensuring the availability of judicial review as an aspect of the rule of law, while stating that this power will only be strongly exercised in exceptional situations, thus according the executive and legislature much leeway. Hence, while Singapore has witnessed an expansion in political space for debate and opposition in recent years,[94] there have been contrary developments in more recent times.

[92] *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069, para 34 (CA).

[93] *Vellama* (CA), n 59 above, para 85.

[94] See Thio LA, 'Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"' (2003) 1(3) *International Journal of Constitutional Law* 516 but compare Derek Da Cunha's critique that this opening up of space may be more apparent than real: D da Cunha, *Singapore in the New Millennium: Challenges Facing the City-State* (2002), 271–274.

While the current Prime Minister Lee Hsien Loong has been associated with a more inclusive and open political style,[95] recent legal changes such as the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA)[96] have raised concerns among critics about a reversion to a more constricted democratic space. At the same time, Singapore now has a highly educated population who use the Internet to inform themselves, connect with one another, as well as share ideas and opinions. While the population may generally agree with an approach to governance that is more communitarian, rather than strictly orientated towards individual rights, they have shown less willingness to accept a top-down, authoritarian approach. The further inroad that the Workers' Party made in the 2020 general election by capturing ten parliamentary seats, the best showing by an opposition party since the nation's independence,[97] is probably as much a testament to its ability to connect with the electorate as it is a vote against what some saw as the heavy-handed use of the law to control public discourse.[98] As Singapore sees a further maturing of its democracy, it is likely that a greater conceptual distinction will need to be made between authoritarian and communitarian conceptions of the rule of law.

[95] For instance, in his 2006 National Day message, Prime Minister Lee Hsien Loong explicitly stated that the government would build a more open society and encourage freer debate: see Lee Hsien Loong, 'Prime Minister Lee Hsien Loong's National Day Message 2006' (8 August 2006) at para 13, Archives Online, National Archives of Singapore. Available at: www.nas.gov.sg/archivesonline/data/pdfdoc/2006080801.htm.

[96] No 18 of 2019.

[97] C Yong and J Iau, 'Singapore GE2020: Signs of Young Voters' Crucial Role in Election Outcome' *The Straits Times* (16 July 2020). Available at: www.straitstimes.com/singapore/signs-of-young-voters-crucial-role-in-ge2020-outcome.

[98] G Ho and Y Sin, 'Singapore GE2020: A watershed election and new normal?' *The Straits Times* (12 July 2020). Available at: www.straitstimes.com/politics/a-watershed-election-and-new-normal.