

WORLD BAR CONFERENCE – KEYNOTE SPEECH
Challenges to the rule of law for the judiciary and the profession with a focus on
Singapore

Introduction

1. Good afternoon, first let me express my heartfelt gratitude to the ICAB and the New Zealand Bar Association for extending to the Singapore Bar and judiciary an invitation to this excellent conference. I have always maintained that international dialogue is indispensable if we are to gain genuine ground on the common issues which concern our jurisdictions. It is both humbling and gratifying to be given the opportunity to add my voice to the important conversations that we are having today and over the course of the next few days. When I was invited to deliver this keynote address I was asked to speak on the challenges to the rule of law for the judiciary and the profession with a focus on my own jurisdiction. The rule of law is nothing less than our lives' work, and those of us who have taken up judicial appointments will be more than ordinarily attuned to the challenges which can arise in upholding this foundational ideal. The advantage of a jurisdiction as small, open and young as Singapore is that these challenges are often easy to diagnose. The fly in the ointment is that they are also impossible to ignore. Any erosion to the rule of law has an immediate and outsized impact upon our national order. For us the rule of law has always been not just an aspirational ideal but an existential necessity.

2. Some, particularly those on the outside, tend to think of Singapore's legal system in terms of seeming contradictions. We are seen as corruption-free but over-policed, progressive yet paternalistic, cosmopolitan in outlook but Confucian in spirit. I mention this to highlight a feature of the modern-day debate over the rule of law. Traditionally, the dialectic was fixated on the binary division between the substantive and formalistic schools of thought. The focus today has shifted – away from definitions towards applications, and away from legal ideology towards public policy.¹ Our attention is increasingly drawn towards a more practical assessment of how to attain competing values within the compendious notion of the rule of law.

3. We ask, for example, how the rule of law can contribute towards social good or economic development – and vice versa – more often than we pose the question of whether a system that promulgates bad or evil laws still constitutes a system of law. This, perhaps, is a reflection of the times. Since the end of the Cold War the geo-political order has been re-defined by the phenomenon of globalisation and with this, the collective focus of the world has turned towards the project of development in all its dimensions including, of course, the rule of law. In September 2012 the UN General Assembly adopted a declaration in favour of further dialogue on national strategies for advancing the rule of law,² and it is also expected that the rule of law will be part of the UN agenda for sustainable development after 2015.

¹ See for example T Carothers, "The Rule of Law Revival" (1998) 77 Foreign Aff 95 and Amartya Sen, "What is the Role of Legal and Judicial Reform in the Development Process?" delivered on 5 June 2000 at the World Bank Conference on Comprehensive Legal and Judicial Development, available online at <
<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf> >

² *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (New York, 2012) (A/67/L.1, 19 September 2012 and reissued on 20 September 2012)

4. Returning to Singapore's part in this discussion, the first point I make is that the competing images and assessments of Singapore's legal system reflect the modern preoccupation with how the rule of law should be subjectively actualised. It is very much about how individual states calibrate the scales of justice. The second point I make is that Singapore represents an object study in the relationship between the rule of law and development, which is now in the foreground of the global conversation. I will develop these points referencing three specific aspects of our legal system. But let me begin by taking a closer look at the relationship between Singapore's legal and economic systems.

"It's the economy, stupid"

5. While it may be useful to look at a legal system in isolation, it must be remembered that the individual institutions of any country have knock-on effects on each other and must be looked at as a composite whole. For Singapore, the development of our legal and economic systems is inexorably linked by common principles.
6. Singapore became independent in 1965. As a nation, we have just entered our fiftieth year. At the time of our birth as a new nation, the perceived wisdom was that newly independent states should completely unshackle themselves from the vestiges of colonialism. Foreign direct investment by multi-national corporations was seen as a form of neo-colonialism. Singapore bucked this trend, and decided that attracting foreign direct investment was the way to go. To put things in perspective, Singapore was a third world nation at that time. With a GNP per capita of less than US\$320,³ our openness to foreign trade had a very different complexion to the paradigm examples of liberalisation in Russia under Gorbachev or China under Deng Xiao Ping. Even today, in this age of globalisation, there are many who believe that developing economies should not hastily open their markets to outside capital.⁴ It is easy to forget this today but Singapore's strategy was unorthodox for its time.⁵
7. The main reasons behind this strategy were three-fold: first, Singapore is geographically tiny and vulnerable; second, Singapore has no natural hinterland after separation from the Federation of Malaysia in 1965; and third, Singapore has no natural resources to speak of, whatsoever. Given these constraints, we had to fully commit to opening our economy to the world and go down the route of attracting foreign direct investment.⁶
8. This of course meant that Singapore had to fully embrace the tenets of free-market capitalism. We harnessed market forces, capital and technology from the world over to climb up the value chain. But this only tells part of the story. Capitalism cannot work without at least some levels of state intervention particularly in the establishment of essential infrastructure. Pure libertarianism in that sense is unworkable.⁷ There are some social goods which simply cannot be left to the market — I need only mention roads and police

³ An overview is available online at <<http://www.edb.gov.sg/content/edb/en/why-singapore/about-singapore/our-history/1960s.html>>

⁴ J Stiglitz, *Globalization and Its Discontents* (W W Norton & Company, 2002)

⁵ Most countries practised import substitution. See H J Bruton, "A Reconsideration of Import Substitution" (1998) XXXVI *Journal of Economic Literature* 903

⁶ See in general W G Huff, *The Economic Growth of Singapore: Trade and Development in the Twentieth Century* (Cambridge University Press, 1994)

⁷ R Nozick, *Anarchy, State and Utopia* (Basic Books, 1974)

forces to make my point. It would be practically difficult, if not impossible, for self-interested economic actors to coordinate affectively on, or to be incentivised to pay for, such social goods.

9. Our legal system is part of that same public order and suffused with the same principles.

Singapore's legal system

10. A competent, accessible and corruption-free legal system is a double imperative for Singapore, both for justice in itself and also for the economy at large.
11. The availability of state-provided dispute resolution is essential to a well-ordered economy. This is so even if most persons do not actually end up using the courts. Economic actors bargain in the shadow (or perhaps the light) of the law, and take into account their default entitlements under the law during the process of bargaining.⁸ These default entitlements arise from, amongst other things, property, contract, and tort and must, as a last resort, be enforceable in a court of law. A failure to enforce such entitlements would upset legitimate expectations.
12. The state has played a large part in maintaining the legal system in Singapore; the 2014 budget allocated S\$636 million to law.⁹ The assurance that rights will be enforced, and disputes adjudicated on with a reasonable degree of expeditiousness, also has salutary knock-on effects for the economy at large. Faith in contracts depends on the ability to monetise legal rights when this is required and in turn, this facilitates trade and the availability of credit. MNCs and investors generally are more likely as a result to find Singapore an attractive investment destination. The Singapore courts were, once upon a time, encumbered with a long backlog of pending cases. This is no longer the case today. For instance, it takes an average of 16 weeks for a civil appeal to be heard in the Court of Appeal from the collection of the record of proceedings and a little over a fortnight for a writ action to be heard in the High Court from the date of setting down.¹⁰ On all these quantitative measures, the health of our legal system can be regarded as satisfactory.
13. Of course, statistics cannot be the be-all and the end-all. Legal systems are also qualitatively assessed according to objective standards. Beyond formal access to the legal system, justice can only be done if the system possesses certain characteristics, which is precisely what the rule of law is concerned with. Raz developed eight principles of the rule of law¹¹ while Fuller deemed this the inner morality of the law.¹² These requirements are well-rehearsed, and include prospectiveness, stability, judicial independence, accessibility, and so on. To Lord Bingham, who had a more practical bent, this ultimately meant that everyone would be bound by, and entitled to the benefit of, laws made publically, taking effect in the future, and administered in the courts.¹³ There are also many

⁸ H Jacob, "The Elusive Shadow of the Law" (1992) 26 Law & Soc'y Rev 565

⁹ Analysis of Revenue and Expenditure: Financial Year 2014, Cmd No 1 of 2014

¹⁰ Supreme Court of Singapore 2012 Annual Report at pp 56–57

¹¹ J Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195

¹² L L Fuller, *The Morality of Law* (Rev Ed, Yale University Press, 1969)

¹³ T Bingham, *The Rule of Law* (Penguin, 2011)

others who argue that the rule of law ought to go beyond such requirements, to encompass issues such as human rights and democratic participation.¹⁴ We expect the law to bear an intrinsic value, even as we increasingly acknowledge that it also performs an instrumental function. The reality is that each jurisdiction must balance and ultimately maximise these plural virtues of the rule of law.

Challenges and tensions

14. We are accustomed to think of the instrumental and intrinsic values of the law as diametric opposites,¹⁵ but perhaps they can and do co-exist functionally and they are more constructively to be viewed as separate matrices along which the rule of law can be advanced.
15. Let me turn in that light to highlight some aspects of the Singapore legal system that might help examine how Singapore has attempted to strike this balance along these dual matrices.

Eradicating corruption

16. I begin with an example which operates on a systemic level, namely the eradication of corruption. This is a subject where in my view the intrinsic and instrumental values of the rule of law are perfectly aligned. It is difficult to pin down a universally accepted definition of corruption. Broadly speaking, corruption involves the misuse of public power for private or political gain.¹⁶ Singapore has adopted a zero-tolerance approach towards corruption.
17. Corruption is repugnant to the rule of law in at least three respects. First, the rule of law mandates that there be congruence between the law as it stands on the books and the law as it is actually applied. This is one of Fuller's cardinal eight principles of the inner morality of the law, and he explicitly identified bribery and the drive toward personal power as two ways in which this congruence may be impaired.¹⁷
18. Second, the rule of law mandates just that — the subjugation of all, regardless of rank, status, or connections to the same set of legal rules. To Dicey, this was a crucial aspect of the Rule of Law that was characteristic of England. Rule of Law not only meant that no man was above the law, but also that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm".¹⁸ Corruption imperils this ideal because the wealthy and well-connected would, de facto, be held to a different set of standards from the rest of society.

¹⁴ P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] Public Law 467

¹⁵ See for example Brian Z Tamanaha, "How an Instrumental View of Law Corrodes the Rule of Law" [2007] 56 DePaul L Rev 469

¹⁶ S Rose-Ackerman, "The Challenge of Poor Governance and Corruption", [2005] Especial 1 DIREITO GV L Rev 207

¹⁷ L Fuller, *The Morality of Law* (Yale University Press, 1969) at p 81

¹⁸ A V Dicey, *Introduction to the Study of the Law of the Constitution* (1915) at p 193

19. Third, and most fundamentally, the rule of law is connected with human dignity. Hayek, following in the vein of Kant, emphatically stated that man is free if he needs to obey no person but solely the laws. The rule of law, under this worldview, is “the legal embodiment of freedom”.¹⁹ Corruption undermines this commitment to human dignity, because the regular and impartial administration of the law takes a backseat to the personal gain of the very people who are entrusted to apply it. Rawls took a similar view. Rawls conceived of the legal system as a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. If the bases of mutual cooperation are threatened by corruption, then so too are the boundaries of one’s liberties.²⁰
20. As a matter of principle, there is emphatic consensus that corruption derogates from the rule of law. Unsurprisingly, empirical research confirms that corruption also has a negative impact on economic growth. I mention just two such studies. Mauro found a link between corruption and lower rates of private investment, which ultimately led to reduced economic growth.²¹ Building on Mauro’s research, Pak Hung Mo found that a 1% increase in the level of corruption reduces the growth rate by 0.72%.²² One would expect the impact on foreign investment to be even greater than that. Even if we discounted the unpredictability and reputational risks which attend to dealing with corrupt systems, investors are ultimately most concerned about the bottom line – and corruption adds directly to the cost of business.
21. This is an issue which Singapore takes very seriously and no level of society has been spared from prosecution under our corruption laws. Indeed, public officers are punished more severely precisely because of the risk of a loss of confidence in and damage to the reputation of public institutions.²³ As a result of this, Singapore is consistently ranked amongst the least corrupt countries in the world,²⁴ (alongside New Zealand, I might note) which has surely played at least some part in Singapore’s transition from the Third World to the First World.
22. It is often overlooked that this has not always been the case. When Singapore was under colonial rule, corruption was rife.²⁵ According to academic analysis, the causes of corruption in colonial Singapore were three-fold: low salaries, especially of policemen, ample opportunities for corruption, and the low risk of detection and punishment.²⁶
23. Singapore’s post-Independence strategy for combating corruption has involved both the carrot and the stick. The government has progressively improved the wages of public

¹⁹ F A Hayek, *The Road to Serfdom* (Routledge Classics, 2001) at p 85

²⁰ J Rawls, *A Theory of Justice* (Harvard University Press, Rev Ed, 1999) at p 207

²¹ P Mauro, “Corruption and Growth” (1995) 119(3) *The Quarterly Journal of Economics* 681 at p 683

²² Pak Hung Mo, “Corruption and Economic Growth” (2001) 29 *Journal of Comparative Economics* 66 at p 76

²³ *Public Prosecutor v Peter Benedict Lim Sin Pang* [2013] SGDC 192 at [122] – [127]

²⁴ See e.g. <http://cpi.transparency.org/cpi2013/results/>

²⁵ J S T Quah, “Combating Corruption in Singapore: What Can Be Learned?” (2001) 9(1) *Journal of Contingencies and Crisis Management* 29 at p 29

²⁶ *Ibid.* at pp 30–32

servants. In particular, then Prime Minister Lee Kuan Yew contended that ministers had to be remunerated in a manner that was pegged to the market rate for their services. He thought that “moving with the market is an honest, open, defensible and workable system” which if abandoned would “end up with duplicity and corruption”.²⁷ Ministerial salaries are currently benchmarked to the median income of the top 1,000 earners in the country who are Singapore citizens.²⁸

24. At the same time, the Corrupt Practices Investigation Bureau (“CPIB”), which is an investigatory body independent of the police force, has been strengthened and given more powers. For instance, in 1963, the Prevention of Corruption Act was amended to empower CPIB officers to require the attendance of witnesses and to question them.²⁹ The penalties for corruption have been enhanced to keep up with inflation and increase the effect of deterrence. The maximum fine was increased in 1989 to \$100,000 from \$10,000;³⁰ this is in addition to the offender being subject to the imposition of a penalty in an amount equivalent to the amount of gratification received.³¹
25. Singapore has spared no effort in its attempt to eradicate corruption, and by most accounts we have been very successful. Crucially, we continue to maintain a high level of vigilance on this issue. It has become a cornerstone of our legal system, a key component to Singapore’s competitive advantage and, importantly, also a part of our national identity.

Public law: statutory interpretation

26. Let me turn to my next example, which shifts our perspective from a systemic to a judicial one. While there is I think universal agreement that corruption is categorically incompatible with the rule of law, other aspects of legal policy and judicial philosophy leave more room for varied responses. This is not least because each jurisdiction may prefer its own combination of normative values in furthering the rule of law. From the judicial viewpoint, the values which are advanced in the development of case law will depend very much on the court’s own conception of its constitutional role.
27. One legal doctrine which directly engages this subject is that of statutory interpretation, which goes to the very heart of how the court envisions its role as a custodian of the rule of law. In particular, statutory interpretation grapples with the question of *what exactly* judges have custody over – whether it is just the text of the law as promulgated by the legislature, or its objects and outcomes as well. It is also highly pertinent to our present discussion because statutory interpretation mediates the interface between different branches of government, and thereby impacts upon how judicial independence is exercised.

²⁷ *Singapore Parliamentary Reports* (22 March 1985) at col 1218

²⁸ White Paper, *Salaries for a Capable and Committed Government* (Cmd 1 of 2012), 10 January 2012 at para 63

²⁹ See Prevention of Corruption Act (Cap 241, 1993 Rev Ed) s 27

³⁰ *Ibid.* at s 5

³¹ *Ibid.* at s 13

28. The English position has traditionally been chary of admitting background material to aid in the interpretation of statutes, save of course the well-known exception in *Pepper v Hart*.³² Even that exception has been subject to intense criticism, notably by Lord Steyn in his extra-judicial capacity when delivering the Hart Lecture in 2000.³³
29. In Singapore, s 9A(3) of the Interpretation Act³⁴ expressly permits the court to refer to drafting materials. This is similar to the position in Australia, but differs significantly from the English approach. However, one must draw a clear distinction between the consideration of extraneous materials and the purposive interpretation of statutes. The latter is now one of the fundamental tenets of statutory interpretation across the common law world. The very point of statutory interpretation is to achieve the intention of the legislature which had passed the Act in question. The difference lies in two areas – first, whether the search for legislative intent is confined only to the language of the statute or if it should also encompass other materials; second, whether the purposive approach to statutory interpretation takes precedence over other canons of statutory interpretation. These differences bring out the tension I alluded to earlier, between the instrumental and intrinsic values of the rule of law. We have to confront difficult questions regarding the extent to which courts should seek to assist in the fulfilment of policy objectives, and at what point this might derogate from their institutional competence and even the separation of powers.
30. An illustrative example of the problems that can arise was provided by Lord Hoffmann in *Chartbrook*, which was a follow-up to his judgment in *Investor's Compensation Scheme*. Lord Hoffmann observed that *Pepper v Hart* had encouraged ministers and others to make statements during Parliamentary debates in the *hope* of influencing the construction which the courts will give to a statute. In that sense MPs are not so different from commercial litigators.³⁵ In Singapore the direction to look at parliamentary materials is entrenched by statute, and therefore emanates from Parliament itself. Section 9A(3) of our Interpretation Act also draws the court's attention specifically – but not exclusively – to the speech made in Parliament by the Minister who moves the Bill in question. I do not propose to resolve the many difficult questions which arise in this area of the law today; I only to offer up how we have sought to fashion a workable answer.
31. During the second reading of the Interpretation (Amendment) Act 1993 in the Singapore Parliament, the Minister explained that the amendments were responsive to “ever increasing legislation of a complexity and variety not encountered before”.³⁶ In *Public Prosecutor v Low Kok Heng*,³⁷ the Singapore High Court confirmed that the Interpretation Act conferred priority to the purposive approach over other interpretive doctrines, such as the plain meaning rule.³⁸ However, the court also qualified that such an approach cannot

³² *Pepper (Inspector of Taxes) v Hart* [1993] AC 593

³³ Reprinted in “*Pepper v Hart*; A Re-examination” [2001] 21 OJLS 59

³⁴ Interpretation Act (Cap 1, 2002 Rev Ed)

³⁵ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [38]

³⁶ *Singapore Parliamentary Debates, Official Report* (26 February 1993) vol 60 at col 519

³⁷ *PP v Low Kok Heng* [2007] 4 SLR 183

³⁸ *Ibid.* at [41]

go against all possible and reasonable interpretations of the actual statutory wording.³⁹ Thus, while our judicial philosophy places an emphasis on purposive interpretation in consultation with relevant extrinsic materials, we are nevertheless cognisant that this process cannot go beyond what the language of a statute can bear. At the same time, it is also useful to keep in mind how slippery language itself can be – in his celebrated monograph, *The Discipline of Law*, Lord Denning referred to this as “the infirmity of the words themselves”.⁴⁰ In a recent decision of our Court of Appeal, we considered just such an infirmity and the judgment handed down by Justice Andrew Phang contains the following useful and colourful summary: “[the] courts must nevertheless arrive at considered (and definite as well as clear) decisions in accordance with logic, principle and context in the case at hand. They must, in this regard, utilise all relevant legal materials. And they must, of course, assiduously avoid the approach of Humpty Dumpty in Lewis Carroll’s *Through the Looking-Glass*... in particular, the court cannot make the word mean what *it* chooses it to mean.”⁴¹ Perhaps the description which best encapsulates our judicial philosophy towards statutory interpretation is that in practicing purposive interpretation we have strived to be as inclusive and comprehensive as possible.

32. Such an unstinting approach is necessary not least because statutes, being prospective in nature and of general application, are often drafted in an open-textured fashion. Moreover, we cannot ascribe omniscience to the legislative draftsman – as much as the statute constitutes a primary source of law to be applied by the courts, judges must remain cognisant of the constraints that draftsmen labour under. Such constraints can be circumstantial, such as imperfect information at the time of drafting, or intrinsic – for example, the inherent imprecision of language. A rigid linguistic analysis may therefore be both unworkable and unrealistic. In such circumstances the court must marshal all resources to fulfil the purpose of a piece of legislation. A case of such a nature came before the Court of Appeal in *Kok Chong Weng*,⁴² which concerned the provisions in the Land Titles (Strata) Act governing the collective sale of strata developments. Under the Act, the percentage of homeowners who must consent to the collective sale will depend on the age of the development as calculated from the point the building authority certified that it was fit for occupation or fully completed. The case at hand concerned a property which came onto the market before this certification scheme had been introduced, and so there was a preliminary question of whether the Act was engaged at all. The court concluded, after referring to the Parliamentary debates, that the Act was intended to apply to all strata developments but the draftsman had probably failed to realise that some developments pre-dated the certification regime. There was therefore a lacuna in the statute for older developments. Nevertheless, the court held that this ought not to frustrate the primary legislative purpose and calculated the age of the development by reference to when the building authority would have regarded the development as being completed or fit for occupation.

³⁹ *Ibid.* at [52]

⁴⁰ Lord Denning, *The Discipline of Law* (Butterworths, London, 1979) at p 5

⁴¹ *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd partnership* [2013] 4 SLR 1116 at [2]

⁴² *Kok Cheng Weng and others v Wiener Robert Lorenz and others (Ankerite Pte Ltd, intervener)* [2009] 2 SLR(R) 709

33. This case stands as an illustration of how the Singapore courts have sought constructive solutions in situations of legislative ambiguity. In so doing our courts remain guided by the lodestar of legislative purpose or intention even as we try to do justice by each case. This is a balance which I will revisit shortly in my next example.

Public law: prospective overruling

34. We began with the topic of corruption, which attracts a high degree of consensus, and proceeded to statutory interpretation, where there are more conceptual challenges. For my third example I shall push the boat into choppy waters, and examine the controversial notion of prospective overruling.⁴³ Earlier this week, a specially-convened three judge panel of the High Court issued the grounds of its decision in the criminal appeal of *Public Prosecutor v Hue An Li*.⁴⁴ In its grounds, the court considered prospective overruling at length, and held that prospective overruling could be warranted in exceptional cases. The facts of the case are an excellent springboard. The accused had gone for more than 24 hours without sleep, and tragically crashed her vehicle into the back of a lorry, resulting in the death of an unsecured passenger. She was charged with, and pleaded guilty to, one count of causing death by a negligent act. The controlling case in this regard was *Gan Lim Soon*,⁴⁵ a High Court decision dating back to 1993; it stipulated that the default punitive position for such an offence was a fine although this could be adjusted to take account of aggravating factors. Following this, the District Judge in *Hue An Li* sentenced the accused to a fine and a disqualification from driving, but did not impose a term of imprisonment. In 2008, the Penal Code had been amended to make clear that causing death by negligence and causing death by rashness were separate offences with their own spectra of possible sentences; the former carried a maximum term of two years and the latter, five years. Despite this, a number of High Court decisions continued to regard the default punitive position to be a fine in line with the position laid down in *Gan Lim Soon*. In *Hue An Li*, we noted that this was untenable in light of the changes to the Penal Code, and that the default position should be a short period of incarceration. We also laid out extensive sentencing guidelines on the application of which the accused in the case before us would have faced a prison term of several months. But we also noted that the accused's lawyers had extensively relied on *Gan Lim Soon* and a whole string of cases which took the default position to be a fine and where there had been no discussion of some of the points we laid down in *Hue An Li*. It would have been unfair if we had sentenced the accused under the new position. We therefore gave prospective effect to our decision to depart from *Gan Lim Soon*, and allowed the appeal but sentenced the accused to a much shorter period of incarceration than would have been warranted under the new position.

35. Prospective overruling is, of course, intimately bound with rule of law concerns. Hayek succinctly summarizes the main thrust of the rule of law thus: government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to

⁴³ See also *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 and *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842

⁴⁴ *Public Prosecutor v Hue An Li* [2014] SGHC 171

⁴⁵ *Public Prosecutor v Gan Lim Soon* [1993] 2 SLR(R) 67

foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.⁴⁶

36. This does not exactly sit well with how common law courts usually operate. When a common law court pronounces on the law, the pronouncement operates both forwards and backwards in time. Thus the defendant in *Donoghue v Stevenson*⁴⁷ was held bound by Lord Atkin's neighbour principle even though this principle was inchoate when the Paisley snail actually found its way into the bottle. This potentially cuts against the rule of law as envisioned by Hayek: manufacturers of ginger beer would have expected to be able to plan their affairs on the basis that they would not be liable in tort to end-consumers.
37. The retroactive effect of common law decisions was initially explained by the declaratory theory of law, which posits that Judges merely discover or declare what was already there all along. Judicial decisions therefore operate simply as evidence of the immutable common law. On this understanding it is our received understanding of the supposedly unchanging law that is corrected from time to time.
38. To modern lawyers, and certainly to working judges, this might sound like an elaborate fairy-tale.⁴⁸ In *Kleinwort Benson Ltd v Lincoln City Council*⁴⁹, four members of the House of Lords rejected the declaratory theory and essentially said that the common law does change to keep up with the times. We too have rejected the notion in Singapore.
39. The bottom, it seems, has fallen out under the mandatory retroactivity of common law decisions. But a rejection of declaratory theory does not entail a rejection of all its myriad consequences. Retroactivity is entrenched in the common law, and for good reason: the entire mechanism of justice is premised on the refraction of legal principles through the prism of real world disputes. Litigants are incentivised to engage in the justice system because they reap the practical benefits of being on the right side of legal arguments. Only the very foolish or the very high-minded would prosecute claims otherwise. For some, retroactivity is also justified because the practice of pronouncing laws prospectively is endemic to legislatures, while the courts must remain neutral and non-legislative.⁵⁰
40. This is one area where the strict tenets of the rule of law commonly yield to more practical considerations, such as ensuring a workable system of justice. While the default position continues to be retroactivity, there is an increasing recognition that exceptional circumstances could call for retroactivity to be limited. *Hue An Li* follows in the footsteps of a number of commonwealth cases. I name just two examples.
41. *Re Language Rights Under s 23 of the Manitoba Act*, a decision of the Canadian Supreme Court, is one such example.⁵¹ Two constitutional statutory instruments made it mandatory for statutes to be published in English and French. The court held that statutes published

⁴⁶ F A Hayek, *The Road to Serfdom* (Routledge & Sons, 1944) at p 54

⁴⁷ [1932] AC 562

⁴⁸ Lord Reid, "The Judge as Law Maker" (1972-73) 12 J Soc'y Pub Tchrs L 22 at p 22

⁴⁹ [1999] 2 AC 349

⁵⁰ *Edward v Edward Estate* (1987) 39 DLR (4th) 654 at [30]

⁵¹ (1985) 19 DLR (4th) 1

only in English were invalid, but restricted the retrospective effect of the ruling. The impugned acts were deemed temporarily valid for the minimum period necessary for their translation and re-enactment, because a retrospective declaration of invalidity would lead to result in a legal vacuum. The Rule of *Law* requires, in the first place, the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.⁵²

42. In *Re Spectrum Plus Ltd*, a decision of the House of Lords, concerned the classification of fixed and floating charges.⁵³ The financial industry had relied extensively on a first-instance decision which held that certain transactions gave rise to floating charges, but this was overruled. Lord Scott opined that prospective overruling could be justified where a decision would have gravely unfair and disruptive consequences of past happenings.⁵⁴ On the facts presented however, this was not satisfied because sophisticated operators could not have been lulled into a false sense of security by a first-instance decision.⁵⁵
43. Special considerations come into play where criminal law is concerned and physical liberty is at stake. Article 9 of the Constitution of Singapore⁵⁶ provides that no person shall be deprived of his life or personal liberty save in accordance with law. In Singapore, the Court of Appeal decision of *Abdul Nasir bin Amer Hamsah v Public Prosecutor* interpreted life imprisonment to mean imprisonment for the remaining period of the prisoner's natural life.⁵⁷ At the time the decision was handed down, life imprisonment was consistently taken by the executive to mean 20 years of imprisonment. The decision was therefore given prospective effect in order to protect the legitimate expectations of individuals who must be taken to have arranged their affairs on the basis of the previous prevailing interpretation.
44. As can be seen, prospectiveness and retroactivity are both apt to produce their own brands of injustice. A patchwork of competing considerations come into play in determining whether retroactivity should be fully or partially qualified. Limiting the effect of a decision to future cases would potentially rob parties of the incentive to participate in the system of justice, and undermine the law-based adjudication of disputes. On the other hand, the foremost concern of the rule of law is to enable its subjects to rationally plan their affairs around stable rules. In *Hue An Li*, we considered the following four factors to be relevant in determining whether prospective overruling would be warranted: first, the extent to which the law or legal principle concerned is entrenched; second, the extent of the change to the law; third, the extent to which the change to the law is foreseeable; and fourth, the extent of reliance on the law or legal principle concerned. We anticipate that the tension between prospective and retroactive effect of changes to the law will continue to be resolved on a case-by-case basis.
45. The discussion on prospective overruling brings us back full circle to basic questions, not just about the content of the "rule of law", but also about the relationship between the rule of law and the larger social order.

⁵² *Ibid* at [64]

⁵³ [2005] 2 AC 680

⁵⁴ *Ibid* at [40]

⁵⁵ *Ibid* at [43]

⁵⁶ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)

⁵⁷ [1997] 2 SLR(R) 842

Conclusion

46. I hope that this brief survey of the Singapore legal system and our jurisprudence has offered some idea of how we have attempted to meet the challenge of upholding the rule of law across various issues. I would like to conclude with a more big-picture solution, which will also take us back to the modern debate about the relationship between the rule of law and development. It is my belief that the rule of law can be simultaneously advanced both intrinsically and instrumentally by a process of international legal convergence. Globalisation has been a revolutionary force on all levels, be it economic, cultural or political. The law is no exception. As the pace of globalisation intensifies, it is inevitable that our legal systems will also begin to gravitate towards one another. I suggest that it is incumbent upon judges, lawyers, academics and legislators to engage with and contribute to the enterprise of legal convergence sooner rather than later. In an interconnected world, operating in jurisdictional silos will no longer be workable. We shall need to find international legal solutions to international problems, and our laws of commerce must facilitate rather than impede international trade.
47. If we are committed to this process of convergence I surmise that we will also be strengthening our intrinsic legal foundations. It is not difficult to see how a more outward-looking legal-system would be more open and accessible to its citizens as well as to international users. Being a member of the international legal community will also require our legal institutions to be more transparent and accessible to external scrutiny. Further, the more a system has to measure and perhaps even justify its norms and principles against those of other jurisdictions, the clearer its own laws and jurisprudence will be. These are all requirements which scholars such as Joseph Raz and Lon Fuller have set out as constitutive of the rule of law.
48. If we look at other conceptions which stress the importance of subjecting executive power to legal limits, we can begin to see how the creation of internationally accepted legal norms will place an external check on state activity. More importantly, legal convergence has the potential to significantly enhance one of the most universally accepted foundations of the rule of law, which is judicial independence. The judiciary is not only separate from the other arms of government, but is part of an international fraternity with certain common standards which are divorced from local political conditions. Such standards already exist; they include the UN's Basic Principles on the Independence of the Judiciary adopted in 1985⁵⁸ and the Burgh House Principles developed by the International Law Association on the Practice and Procedure of International Courts and Tribunals.⁵⁹ Many judiciaries have also developed their own judicial codes of conduct, which would surely benefit from the aggregative insights of what has been done in other jurisdictions.
49. Ultimately the benefits which I have mentioned accrue from the presence of common international standards against which each jurisdiction can be measured, to which they can aspire, and with which they will improve. This is not just a theoretical argument. It has, in fact, been the Singapore experience. Like our economy, our legal system has been

⁵⁸ Available online at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>

⁵⁹ Available online at < http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf>

consciously outward-facing. In 1986 our legal system began to open itself up to international commercial arbitration by acceding to the New York Convention. Half a decade later, the Singapore International Arbitration Centre was created and heard only a handful of cases each year. It was only after 1994, when Singapore adopted the Model Law, that the industry began to make significant progress. Between 2000 and 2010, the case-load of the SIAC more than tripled, and since then it has kept growing.⁶⁰ Today we are one of the world's leading centres for arbitration. This transformation has been a direct result of our commitment to an internationalist legal philosophy, and it has contributed immensely to the maturation of our legal system. It has helped to raise standards across the Singapore Bar and even set a benchmark for our courts to be measured against. Today Singapore has what is widely regarded to be a well-respected judiciary that meets international standards, and from the Bar we have seen the emergence of a generation of lawyers with cross-jurisdictional experience and regional ambitions. Singapore remains committed to this internationalist philosophy – for the past two years we have been working hard at developing the Singapore International Commercial Court and we have also launched the Singapore International Mediation Centre, both of which aspire to make a lasting contribution to cross-border dispute-resolution in Asia and beyond.

50. We live in a time and age where globalisation has intensified many of the perennial challenges to the rule of law, but at the same time this continuing phenomenon also offers the greatest prospect for the collective advancement of the rule of law. I look forward to working with all of you on this great project. Thank you.

⁶⁰ The SIAC's caseload statistics are available online at < <http://www.siac.org.sg/why-siac/facts-figures/statistics>>