BASIC STRUCTURE AND SUPREMACY OF THE SINGAPORE CONSTITUTION

Recent constitutional adjudication in some common law jurisdictions has embraced the basic structure doctrine that was first applied by the Supreme Court of India to the Indian Constitution. This article argues that in principle, the doctrine is or should be applicable to the Constitution of Singapore. If the theory of the doctrine is politically sound, the fact that the Singapore Constitution expressly allows its own provisions to be amended does not necessarily exclude an implied limitation on the exercise of such power. This article also puts forward a historical explanation for the applicability of the doctrine in Singapore. Finally, it argues that the supremacy of the Singapore Constitution supports the applicability of the doctrine.

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I. Introduction

1 In January 1989, Parliament amended Art 149 of the Constitution of the Republic of Singapore ("Singapore Constitution")[1] and added four new provisions[2] to the Internal Security Act ("ISA"). The amendment curtailed the judicial power of the courts in Art 93 to the extent that detention orders made on national security grounds under s 8 of the ISA could no longer be reviewed by the court except as provided therein.[3]

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* The author of this article was a member of the Court of Appeal that decided *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 and *Teo Soh Lung v Minister for Home Affairs* [1990] 1 SLR(R) 347. As attorney-general, he appeared for the appellant in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489, and also published the Constitution of the Republic of Singapore (1999 Reprint). As chief justice, he decided *Mohamad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 411.

1 In this article, "Singapore Constitution" refers to the authentic text in the 1980, 1992 and the 1999 reprints.

2 Constitution of the Republic of Singapore (Amendment) Act 1989 (Act 1 of 1989) ss 8A–8D.

3 Parliament made the amendments, following the Court of Appeal's *dictum* in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525, that "[a]ll power has

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2 The constitutionality of the amendments was challenged in *Teo Soh Lung v Minister for Home Affairs*[4] ("*Teo Soh Lung*"). Teo argued that her re-detention was illegal because it was based on grounds not connected with national security, but based on her criticisms of the illegality of her original detention. In his submissions to the court, counsel for the Minister declined to argue that the amendments could justify detention on extrinsic grounds.

3 Teo also argued that the constitutional amendment was invalid as it had the effect of destroying a basic feature of the Singapore Constitution, that is, judicial review. Teo relied on *Kesavananda Bharati v State of Kerala*[5] ("*Kesavananda*"), where the Supreme Court held (by a majority) that although the Indian Parliament had power to amend the Indian Constitution[6] in accordance with its provisions, such power was subject to an implied limitation that any amendment (whether by way of addition, alteration or repeal) could not destroy the basic structure or a basic feature of the Indian Constitution. F A Chua J, after reviewing the Indian and Malaysian cases, held:[7]

> 47 [T]he *Kesavananda* doctrine is not applicable to our Constitution. Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution. In any case … none of the amendments complained of has destroyed the basic structure of the Constitution …
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> …
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> 59 … Parliament has the power to amend any provision of the Constitution so long as the special procedure required for amendment is followed …

4 The Court of Appeal dismissed Teo's appeal on the ground that Teo had not made out a case on the facts that her re-detention was not based on national security grounds. The court declined to consider

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legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power". In that case, the court disapproved the decision of the High Court in *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135, where the High Court held that the words were a purely a subjective condition, and therefore the President's satisfaction could not be reviewed by the court as to the sufficiency of the grounds for detaining a person under the Internal Security Act (Cap 115, 1970 Rev Ed).

4 [1989] 1 SLR(R) 461.

5 [1973] AIR 1461.

6 Constitution of India (updated up to (One Hundredth Amendment) Act, 2015).

7 *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 at [47] and [59].

the question whether the basic structure doctrine was applicable in Singapore.[8]

5 In parallel proceedings in *Cheng Vincent v Minister for Home Affairs*[9] ("*Vincent Cheng*"), Cheng filed a similar challenge on similar grounds. Lai Kew Chai J dismissed the application on the ground that Cheng had not made out a case that there was no evidence against him. Lai J also endorsed Chua J's reasons.

6 Neither Chua J nor Lai J held expressly that the Singapore Constitution had a basic structure, but its existence would be implicit in Chua J's decision that the amendment did not destroy it. The Malaysian courts rejected the doctrine in 1977 but its relevance has been revived in a recent decision of the Malaysian Court of Appeal.[10] In contrast, the

8 *Teo Soh Lung v Minister of Home Affairs* [1990] 1 SLR(R) 347.

9 [1990] 1 SLR(R) 38.

10 *Loh Kooi Choon v Public Prosecutor* [1977] 2 MLJ 187 ("*Loh Kooi Choon*"); *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70. In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ 526 ("*Semenyih*"), the Federal Court noted that in *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, the Federal Court (*per* Gopal Sri Ram FCJ) made a frontal attack on *Loh Kooi Choon*, and went on to state that *Liyanage v The Queen* [1967] 1 AC 259 ("*Liyanage*") "probably summed up the concept concisely". However, the decision in *Liyanage* was concerned with the separation of powers doctrine rather basic structure doctrine. Likewise, *Semenyih* itself is concerned with the separation of powers and not with the basic structure doctrine, although the Federal Court referred to the doctrine at paras 74–77 and 87–91 of its judgment in relation to the infamous Art 121(1). It is to be seen whether the Federal Court's ruminations in *Semenyih* on the basic structure doctrine and its effect on Art 121(1) of the Malaysian Federal Constitution (Reprint, as at 1 November 2010) will open the door to a reconsideration of the applicability of the doctrine in Malaysia, and its effect, if any, on Art 121(1).

It may be noted that in *Hinds v The Queen* [1977] AC 195 ("*Hinds*") at 214, Lord Diplock, delivering the majority judgment of the Privy Council, said:

> [A] constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are

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Indian Supreme Court has applied the doctrine to many other features of the Indian Constitution.[11]

7 This article agrees that the amended Art 149(1) did not destroy the basic structure of the Singapore Constitution as it only carved out from the judicial power recourse to judicial review in detention cases under s 8 of the ISA on national security grounds. This limited carve-out may be justified as national security, that is, the survival of the State is an overriding consideration. The legal order established under the Singapore Constitution must be preserved, protected and defended, if necessary by extreme measures. Hence, where national or economic security is threatened, Art 150 authorises the President to declare an emergency. However, judicial review remains available in all other cases.[12] But the broader question remains: does the basic structure doctrine apply in Singapore?

8 This article asserts that, in principle, the doctrine is applicable in Singapore (except as set out immediately above). Chua J's reasoning for not applying the doctrine is not persuasive since he did not explain why the different origins of the Indian and the Singapore Constitutions were decisive, or even relevant, or why because the Singapore Constitution expressly allows its own provisions to be amended, it necessarily excludes an implied limitation on the exercise of such power. It is argued that both grounds are not sustainable if the theory of the doctrine is politically sound.

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inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

Hinds was also not concerned with the basic structure doctrine, but with the separation of powers. The doctrine does not appear to have been considered by the Privy Council.

11 Durga Das Basu, *Shorter Constitution of India* vol 2 (Lexis Nexis, 14th Ed, 2009) at pp 2237–2238 identifies 24 basic features, including supremacy of the constitution, rule of law, separation of powers, and principles behind fundamental rights, secularism and of course, judicial review.

12 In *Tan Seet Eng v Attorney General* [2016] 1 SLR 779, the Court of Appeal held that judicial review was available to examine the legality of a detention order under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed).

II. Basic structure

A. Westminster model constitution and its basic structure

9 The basic structure concerns identity. In *Shorter Constitution of India*,[13] Dunga Das Basu wrote:

> The theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. The Supreme Court has observed that 'one cannot use the Constitution to destroy itself'. It is further observed that 'the personality of the Constitution must remain unchanged'. Therefore, the Supreme Court while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word 'amendment' postulates that the old constitution survives without loss of identity despite the change and it continues even though it has been subjected to alteration. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. The main object behind the theory of the constitutional identity is continuity and within the continuity of identity, changes are admissible depending upon the situation and the circumstances of the day. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form … the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

10 The identity of a constitution is derived from its structure of government and the agreed political, economic and social values and aspirations of the people as a community and a nation enshrined therein. This article contends that the Singapore Constitution has such an identity, based on the principles and institutions of democratic government identified with the Westminster model constitution.

11 In 1961, Stanley de Smith described the basic structure of the Westminster model constitution as follows:[14]

> Desperately fragile and precariously balanced, the Westminster model of parliamentary democracy remains the most sought-after of British exports to the countries of the Commonwealth. From Aden to Zanzibar nothing that can be represented as being inferior to the original will give satisfaction, and even modifications that may render it more adaptable to local conditions are apt to be viewed with suspicion …

13 Dunga Das Basu, *Shorter Constitution of India* vol 2 (LexisNexis, 14th Ed, 2009) at p 2235.

14 Stanley de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government" (1961) 1(1) *Journal of Commonwealth Political Studies* 2.

> In its widest sense it may be also be understood to comprise all the main features of the British Constitution … Among the characteristic features of modern Commonwealth constitutions are the limitations of parliamentary sovereignty, guarantee of fundamental human rights, judicial review of constitutionality of legislation …[15]
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> In its narrower sense – the sense in which the term is used here – the Westminster model can be said to mean a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative lecture.[16]

12 Many, especially post-colonial, states have adopted constitutions incorporating similar norms and values of the legal and political order. Most, if not all, former British colonies, on attaining independence in the 1950s and 1960s, readily adopted the Westminster model. The Federation of Malaya did so in 1957 when the federating states were granted independence by the UK government.[17] So did Singapore, when it joined and then separated from Malaysia in 1963 and 1965. The basic features of their respective Constitutions may not be identical due to differences in their respective political, social and cultural circumstances prevailing at the time the Constitutions were created or have evolved since then. As national values and constitutional and political norms change over time, the Constitutions may change to reflect them.

13 But as described by de Smith, the basic features of the Westminster model constitution are (a) representative government under a parliamentary system of government, (b) the separation of powers, (c) fundamental human rights, and (d) supremacy of the constitution and the rule of law.

15 Stanley de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government" (1961) 1(1) *Journal of Commonwealth Political Studies* 3.

16 Stanley de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government" (1961) 1(1) *Journal of Commonwealth Political Studies* 3.

17 The alliance and most of the other political parties and the Malay rulers favoured the Westminster parliamentary model: see Joseph M Fernando, *The Making of the Malayan Constitution* (Monograph, issue 31) (The Malaysian Branch of the Royal Asiatic Society, 2002) at p 117.

B. Rationale of the basic structure doctrine

14 The basic structure doctrine is an implied limitation on the exercise of amending power expressed in a constitution to be unlimited in scope, subject to the fulfilment of procedural requirements like the percentage of votes necessary to pass an amendment. The doctrine is now firmly established in India, and was first enunciated in *Kesavananda* and affirmed in subsequent decisions.[18] The doctrine was established to check an all-powerful Indian Parliament from amending the Indian Constitution at will. In *Kesavananda*, a majority of the court held that the power to amend could not be exercised to alter the basic structure or fundamental features of the Indian Constitution. The majority held that the word "amend" in the Indian Constitution implied that the identity of the original Indian Constitution formed by its basic structure must remain, as the constitution-makers did not intend the word "amend" to mean "destroy".

15 The doctrine does not concern procedurally defective constitutional amendments, but only with validly passed amendments. If the constitution itself provides an express substantive limitation on the exercise of the power, the doctrine is irrelevant in respect of that power. The doctrine is invoked precisely because the power to amend is not substantively limited. If the power to amend is unlimited, an all-powerful legislature can destroy the constitution and/or make a new constitution, an eventuality the original constitution-makers could not have intended. They could not have intended Parliament could use the amending power to destroy the constitution and also itself.

16 The basis of the doctrine is thus an unexpressed intention of the constitution-makers. It is not logical to argue that because the amendment power in the constitution is not expressly limited, an implied limitation is thereby excluded. It is like arguing that because it has not been included, it is therefore excluded. It is essentially a matter of context. In so far as the decisions of Chua J and Lai J in *Teo Soh Lung* and *Vincent Cheng* are based on this interpretative approach, they should not be followed. *It is precisely because there is no express limitation that an issue of law arises as to whether there is an implied limitation.* What is critical is the intention of the constitution-makers in giving a new constitution to a new state. All the circumstances associated with the making of the constitution, which may be myriad, are relevant to determine their intention.

17 On this proposed approach, the fact that the Singapore Constitution was not drafted by a constituent assembly would not

18 See, *eg*, *Minerva Mills Ltd v Union of India* [1980] AIR 1789.

be material. Nor should it matter exactly when the basic structure is laid down. In the case of India and the 1957 Federation of Malaya ("Malaya"), their Constitutions were promulgated on their independence day, as was that of the 1963 Federation of Malaysia ("Malaysia"). In the case of Singapore, its government was given no choice but to leave Malaysia at very short notice. The Republic of Singapore was born in haste, and so were the related constitutional documents drafted in haste. The fact that the constitution-makers did not have sufficient time to draft a full constitutional text in one document should not be a decisive factor in determining whether the Singapore Constitution has a basic structure in order to attract the application of the doctrine.[19]

C. Basic structure doctrine and Westminster model constitution

18 The doctrine has recently been examined by academics and practitioners as to its applicability in Singapore. In his essay, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises"[20] ("Basic Structure"), Harding has argued that for the doctrine to be applicable, there must exist what he called a "constitutional moment", and that because Singapore did not have such a moment, the doctrine is not applicable here. In comparison, Kevin Tan, in his chapter, "Into the Matrix: Interpreting the Westminster Model Constitution"[21] argued for a doctrine limited to the Westminster model constitution. He wrote:[22]

> Who determines whether Singapore's Constitution is based on the Westminster model? The short answer would be – the courts. In many ways, it is a claim to identity, a self-proclamation of sorts. So long as the courts continue to hold Singapore's Constitution to be based on the Westminster model, the matrix holds true and limits Parliament's amendment powers only in so far as it destroys the structure of the Constitution. Thus, if the Parliament decides to abolish the judiciary completely, the court can strike it down as destroying the Constitution's basic structure. Likewise, it can be argued that Parliament has not the power to obliterate the fundamental liberties provisions under Part IV of the Constitution as all constitutions based on the Westminster model have a bill of rights.

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19 See para 56 below.

20 This was published in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2.

21 Kevin Y L Tan, "Into the Matrix: Interpreting the Westminster Model Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 3.

22 Kevin Y L Tan, "Into the Matrix: Interpreting the Westminster Model Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 3, at p 70.

19 In Basic Structure, Harding accepted that:[23]

> In Singapore's case, the original Constitution embraced parliamentary democracy with its distinctive Westminster-type conventions, including those derived from a distinction between the (non-executive) head of state and the (executive) head of government, and an independent judiciary …

and that this Singapore Constitution has a basic structure. It is not clear which Constitution Harding intends to refer to by the term "original Constitution". He appears to refer to the Republic of Singapore Independence Act[24] of 1965 ("RSIA"). In any case, in his view, "a more convincing argument might be that Singapore's Parliament is, or should be entitled to change the structure of government away from the Westminster model in whatever way it chooses".[25]

20 Harding gave the following reasons:

(a) If the doctrine is applicable in Singapore, it will mean that we will *forever* be saddled with British constitutionalism, an absurd result which the constitution-makers could not have desired or intended.

(b) Fundamental changes have been made to the Singapore Constitution within the last generation regarding both the process of constitutional amendment (that is, the referendum in Art 6) as well as the presidency and the system of parliamentary representation by the introduction of the: non-constituency members of parliament ("NCMP") (in 1984); group representation constituency ("GRC") (in 1988); nominated member of parliament scheme ("NMP") (in 1990); and elected presidency (in 1991). If there is a basic structure in Singapore's Constitution, these aspects must be part of it.

(c) Singapore's sovereignty can be surrendered under Art 6 by a referendum. If any necessary constitutional amendment is enacted to give effect to the referendum, it would be

23 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 38.

24 Act 9 of 1965; see also para 48 below.

25 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 39.

> unconstitutional because it would destroy the Singapore Constitution's basic structure.[26]

Accordingly, Harding concluded:[27]

> Seen in this light, the inapplicability of the basic structure doctrine seems highly compelling. Singaporeans would be astonished to learn that all these changes that have actually occurred, or whose occurrence is envisaged by the express terms of the Constitution were unconstitutional. If they were, the Constitution would be confined within a strait jacket of its own making that effectively allowed for virtually no development.

21 This article does not find Harding's reasons convincing. If the doctrine applies, Singapore will not have to live with British constitutionalism forever, but only with a constitution whose basic structure cannot be changed by constitutional amendment. A democratic constitution can always be changed by another legitimate democratic process. Here, we do not refer to undemocratic means to effect change, like a *coup d'etat*. A referendum is such a means as, properly conducted, it expresses the will of the people and is the most democratic and peaceful way to effect political change. In a democratic state, the constitution, even if supreme, must give way to the higher supremacy of the people. The basic structure doctrine does not apply to constitutional changes effected via referendum. Harding agreed. He wrote that there is "no good reason why the expressed, concerted political will of the community should be struck down by the courts".[28]

22 His second reason is also not convincing. The NCMP, GRC and NMP are consistent with the basic feature of representative government. These changes were meant to fine-tune and improve Singapore's system of parliamentary government. They were introduced for specific purposes, such as to allow greater representation and expression of

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26 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at pp 39–40.

27 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 40.

28 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 42. In Sri Lanka, the Westminster system of parliamentary government was changed to presidential government in 1972 by a referendum, even though it destroyed the original structure of the Sri Lankan Constitution.

different and diverse views on national and other issues, whether from opposition parties not represented in Parliament and/or civil society groups. They are refinements of this basic feature.

23 Similarly, the elected presidency, although charged with additional duties to protect the national reserves and meritocratic system of administration, is also an innovative refinement of the office under the Singapore Constitution. The elected President is not an executive president. His veto and custodial powers enable him to promote good governance or prevent bad governance by the Government. Likewise, the introduction of a guaranteed "Malay" elected President once every five presidential terms is basically another refinement to promote national unity and inclusiveness, the Singapore version of *e pluribus unum*. These changes do not alter the basic feature of representative government under the Singapore Constitution. However, an issue has arisen as to whether the elected presidency has become part of the basic structure. It is suggested that the answer should be that if the basic structure cannot be undone by a constitutional amendment, it cannot be done by such an amendment.[29]

24 Apropos the third reason, Art 6 of the Singapore Constitution was enacted in 1972, at a time when the basic structure doctrine was in a nascent state.[30] The Government was clearly aware of the existential problem that under the Singapore Constitution, as it understood its meaning, a government which controlled a two-thirds majority in Parliament could validly amend the Constitution to give effect to, say, another merger with Malaysia. By inserting Art 6, the Government recognised a referendum as an appropriate and legitimate political means to determine the will of the people. On this rationale, it cannot be argued that a constitutional amendment giving effect to the result of a referendum can be unconstitutional. The real cause of the constitutional change would be the referendum and not the formal amendment to the Singapore Constitution. This article holds the view that even if Art 6 had not been enacted, and, say, a referendum to join Malaysia again had been approved by the electorate, the Singapore courts would not apply the basic structure doctrine to invalidate the related constitution even though it would have destroyed the Singapore Constitution.

29 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 38.

30 See para 3 above.

25 For the reasons he has given above,[31] Harding saw no merit in leaving the door open for future application of the doctrine in the event of an extreme event:[32]

> [L]et us suppose an attempt to amend the Constitution to abolish the separation of judicial power completely and vest it in the legislature or the executive. I suggest that in this event, the niceties of constitutional interpretation become irrelevant, because here we enter the realm of revolutionary politics. If the basic structure doctrine were to be used in a judicial decision striking down an amendment of this kind, it seems to me that the legitimacy or otherwise of such a devastating change would be a political question rather than a legal question. What the role of the judiciary might play in such a scenario is impossible to predict. I see no argument here for deliberately leaving open the possibility of applying the basic structure doctrine.

26 This passage seems to suggest, although it is not that clear, that if such an extreme event occurred, the question of its constitutionality would not end up in court, and that if it did, the courts would be placed between a rock and a hard place. Harding is right. Who knows what the judges will do judicially *in extremis*, where their own constitutional existence is threatened? But there are other kinds of constitutional amendments that Parliament can validly pass under Art 5, such as the following:

(a) Judges are to serve at the pleasure of the President.

(b) Parliament is sovereign.

(c) The term of Parliament is extended to 50 years.[33]

31 See para 20 above.

32 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at pp 40–41.

33 Forty years ago, Hoong Phun Lee posed a similar question in his article published in "The Process of Constitutional Change in Malaysia", published in Tun Mohamed Suffian *et al*, *The Constitution of Malaysia Its Development: 1957–1977* (Tun Mohamed Suffian, Hoong Phun Lee, Francis A Trindade eds) (Oxford University Press, 1978) at p 392. He asked: "[w]hat is the position if Parliament amends Article 55(3) to confer upon itself an unlimited life-span?" His answer was that, taking the "pragmatic" approach to its conclusion (*ie*, the remedy is at the ballot box), the courts would uphold such an amendment. However, he also commented that the Indian judicial approach should not be wholly discarded.

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27 If any of these amendments has the effect of destroying a basic feature of the Singapore Constitution, should the courts apply the basic structure doctrine to declare them unconstitutional? In Basic Structure, Harding suggested that even if there were such a doctrine, it is contextually based, by which he means:[34]

> [A] constitutional principle of this kind cannot be generally regarded as *generally applicable* in any given order. Its applicability will depend on a number of factors that include the actual wording of a given constitution, the circumstances of its drafting, the presumed intention of the constitution-makers, and the perceived role of the judiciary … The saliency and even content (ie what features are basic?) of the basic structure doctrine will vary according to the constitutional context in question. It may well be that the doctrine applies in Malaysia, for example, due to the different context of its constitution-making. [emphasis in original]

It should be noted that under Art 61 of the Constitution, no Member of Parliament may take part in the proceedings thereof until he has taken and subscribed before Parliament the Oath of Allegiance to preserve, protect and defend the Constitution. Hence, if they vote to extend their own elected term from the current five years to an unelected term of 50 years, would they not be destroying the basic feature of parliamentary representation, instead of preserving, protecting and defending the true meaning of representative government?

Furthermore, with respect to voting to promote their own personal interests as members of Parliament, would they also not be in breach of the fundamental rule of natural justice against bias? Would not their votes be a nullity? If this is the case, then only a referendum can effect such a constitutional change legally.

34 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 35. This approach appears to have been rejected by F A Chua J holding in *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 at [59], where he held:

> In my view the Reid Constitutional Commission Report 1957 cannot be regarded as a basis for the interpretation of the legislative powers *conferred by Art 149 or any law passed pursuant to it*. See *Lim Chin Chin Theresa v Inspector General of Police* [1988] 1 MLJ 293. In my judgment Parliament has the power to amend any provision of the Constitution so long as the special procedure required for amendment is followed. Both the amendments to the Constitution and the Internal Security Act were passed by Parliament by more than the two thirds majority required. The amendments constituted 'a law' within the meaning of Art 5(1). [emphasis added]

D. Harding's "constitutional moment"[35]

28 In this context, Harding argued that for the doctrine to be applicable, there must exist what he called a "constitutional moment" in the creation of a constitution. What is the nature of this moment? Harding explained the elements of his test by explaining why Singapore did not have such a moment in the following pages of Basic Structure:

> [Page 35] [T]his doctrine … has no application to Singapore's Constitution … due to the manner in which Singapore's Constitution was laid down in the months and years following Singapore's separation from Malaysia in 1965, that critical moment when a new republic was born in the crucible of international political events.
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> What we see in Singapore's constitutional history … is not an act of a constituent body, such as occurred in India, but rather a constitutional evolution via a gradual legislative process of combining different sources, and subsequent piecemeal attempts to redesign the constitutional apparatus, a process which appears to be still continuing as Singapore celebrates fifty years of independence under its patchwork Constitution …
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> [Page 36] … any conditions for application of the doctrine were simply not present at the critical moment of separation in 1965 and beyond …
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> …
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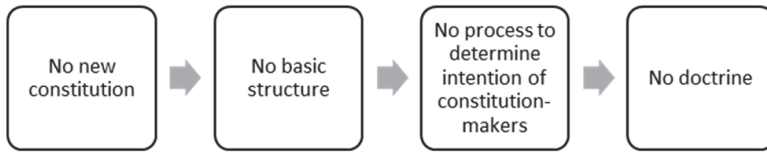
> When Singapore unexpectedly became an independent republic after ceasing to be part of the Malaysian Federation on 9 August 1965, that was potentially an Ackerman 'constitutional moment', but constitutionally it proved not in fact to be simply a 'moment', but rather the beginning of a process of adjustment which may be regarded as ongoing after fifty years.

35 The expression was coined by Bruce Ackerman to describe extraordinary moments or events in American constitutional history when the people, through widespread political expression, took it upon themselves to bring about an effective break from the past. Another American scholar views Ackerman's "constitutional moment" as actually a series of events which could be a multistep, multi-year process, "which includes a series of public debates, political fights, elections, and court battles". Evidence of such "constitutional moments" might be found in "a piece of constitutional text, a transformative text Supreme Court decision, a landmark statute, or an important political speech. To Kevin Tan and Thio Li-ann ("KTT"), an Ackerman "moment" is a momentous, and not a momentary, one, and that in the case of Singapore, there has only been one Ackerman constitutional moment, *ie*, Singapore's separation from Malaysia in 1965. It may be noted that Ackerman's moment is about changing the meaning of The Constitution of the United States or its text by some form of political expression, whereas KTT's moment refers more fundamentally to changing the constitutional or political order or status of a state, *eg*, from political subordination to independence.

> [Page 37] … In Singapore a piecemeal approach was taken that knitted together, largely from existing sources, a renovated rather than a wholly new constitution.
>
> First, the Singapore Parliament passed the [RSIA], which made provision for Singapore's newly established independence …
>
> Second, the RSIA also continued in force the [1963 Singapore Constitution[36]] which applied to Singapore as a State of the Malaysian Federation under the Federal Constitution …
>
> Third, certain applicable provisions of the Malaysian Constitution were also continued in force by the RSIA, notably the fundamental rights provisions now in Part IV of the Constitution of Singapore and the citizenship provisions now in Part X. Essentially, this meant that the constitutional status continued (*mutatis mutandis* …) as opposed to a new constitution being drafted.
>
> …
>
> [Page 39] The contextual point … however, is that there was no constitutional moment in which Singapore's Constitution was created, and therefore no process whereby constitution-makers expressly or impliedly laid down a basic structure for Singapore's Constitution which could not be destroyed by constitutional amendment. Rather, Singapore's Constitution fell into place by a process of piecemeal legislative actions directed towards specific issues. If Singapore had any 'constitution-makers' as such, they might have been the parliamentarians of 1965–1979, the period in which constitutional flexibility was espoused, but, even these members owed much to those who drafted the Constitution of the Federation and the State Constitution of Singapore of 1963. Furthermore, 1979 should not be seen as the culmination of a process of experimentation leading to a consolidation but on the contrary as marking the beginning of such process, which has yet to find its endpoint.

29 Summarising these statements, Harding's constitutional moment may be stated thus: at the critical moment when Singapore exited Malaysia, it did not receive a new constitution from Malaysia (the prior constitution-maker), nor did it (as subsequent secondary constitution-maker) draft a new constitution for the new State of Singapore. Accordingly, there was no process whereby it could be determined whether the constitution-makers expressly or impliedly laid down a basic structure for Singapore's Constitution which could not be destroyed by constitutional amendment. Thus, it is formulated:

36 1963 State of Singapore Constitution; Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (S 1 of 1963) Third Sched.



30 The statement above[37] suggests that a renovation process was started piecemeal, beginning with the RSIA to assemble all the existing sources to form the new Singapore Constitution, which process "has yet to find its endpoint". The 1980 reprint,[38] which consolidated all the constitutional acts enacted subsequently, is only the beginning of the process of experimentation in constitutional-making. Singapore's Constitution is still a work-in-progress, and presumably, its structure keeps on changing as its national values change.

31 In so far as the above statements purport to give account of the historical and legal facts on how the Singapore Constitution was created, this article does not agree with them and will examine this issue later,[39] as it is convenient at this juncture to consider Harding's statement[40] that the basic structure doctrine may well apply in Malaysia, due to the different context of its constitution-making. This tentative statement is interesting as a case study of Malaysia may provide some guidance on the nature of Malaysia's constitutional moment. This point is material, given Singapore's historical roots.

E. Basic structure doctrine in Malaysia

32 Malaysia was established pursuant to the terms of the "Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo and Singapore" on 9 July 1963, which had eleven Annexes. Section 3 of the Malaysia Bill (Annex A) provided as follows:

37 See para 28 above; see also Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 37.

38 Constitution of the Republic of Singapore (1980 Reprint).

39 See paras 38–91 below.

40 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 35.

> The Constitution[41] shall be amended as shown in the First Schedule to this Act, by inserting as Articles of the Constitution in accordance with that Schedule the sections of this Act specified in the second column, and those sections shall be read and have effect accordingly …

33 In *The Government of The State of Kelantan v The Government of the Federation of Malaya And Tunku Abdul Rahman Putra Al-Haj*[42] ("*Kelantan*"), Kelantan applied to the High Court for a declaration that the Malaysia Agreement and the Malaysia Act were null and void or alternatively were not binding on the State on the ground that the Malaysia Act would abolish "the Federation of Malaya", thereby violating the Federation of Malaya Agreement, 1957, and that the proposed changes needed the consent of each of the constituent states, including Kelantan, and this had not been obtained. Thomson CJ dismissed the application, holding, *inter alia*:[43]

> In doing these things I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe, that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan.

34 For present purposes, the relevance of *Kelantan* to the thesis of this article is the hypothetical question whether, if there had been no prior agreement to admit new states, Thomson CJ would have held that the federal government did not have to obtain the agreement of the original states before agreeing to enlarge the Federation by admitting new States by means of a constitutional amendment. It is suggested that, given the basis of his reasoning, Thomson CJ would probably have answered "no" on the ground that the federating states could not have intended that the Federation they had agreed to establish could be destroyed and replaced by a new federation of more states by simply

41 Constitution of the Federation of Malaya, 1957 (M'sia).

42 [1963] MLJ 355.

43 *The Government of The State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 at 359.

amending the 1957 Malaya Constitution,[44] and more so when the new States were treated differently in terms of political rights and powers.

35 It might be said that changing the structure of a federation of states is quite different from changing the basic structure of the constitution of a unitary state. If so, the former is an *a fortiori* case. But, analogically, the overarching principle should be the same. In each case, the question should be, suggested by Harding: what do the contextual circumstances tell the court as to the intention of the constitution-makers?

36 In 1996, Harding had expressed a similar view concerning Malaysia.[45] In discussing the problem of identifying the basic features, Harding suggested that Raja Azlan Shah had described some of them in the Malaysian Constitution as follows: (a) supremacy of the Malaysian Constitution, (b) fundamental rights, (c) distribution of sovereign power between the States and the Federation, and (d) separation of powers. Omitting item (c), this passage could well be a description of the Singapore Constitution as at 1963 and 1965,[46] and more so the 1980 reprint.

37 This article agrees with Harding's tentative view that the doctrine should be applicable in Malaysia, but, if the doctrine is capable of applying in Malaysia, why is it not capable of applying in Singapore? Harding gave the reason that Singapore did not have such a constitutional moment.[47] This article holds a different view. Singapore inherited a constitution on Singapore Day[48] that was no different in terms of basic structure from the Malaysian Constitution (omitting the federal features). There was only one substantial difference. On Singapore Day, the Singapore Amendment[49] did not vest the fundamental rights in the new State of Singapore.[50]

44 Constitution of the Federation of Malaya, 1957 (M'sia).
45 *Loh Kooi Choon v Public Prosecutor* [1977] 2 MLJ 187 and see Andrew Harding, *Law, Government and the Constitution in Malaysia* (Kluwer Law International, 1996) at pp 51–53.
46 See paras 47–52 below.
47 See paras 28–30 above.
48 This was the day Singapore separated from Malaysia on 9 August 1965.
49 Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965).
50 See original para 47 below.

III. Singapore's constitutional moment

38 This article proceeds on the basis that the basic structure doctrine is contextually based as proposed by Harding,[51] and argues that:

(a) Singapore had a constitutional moment, and that given the circumstances in which the Singapore Constitution was created, that moment occurred on Singapore Day or, failing that, on 23 December 1965 when the RSIA was enacted.

(b) In any event, the rationale of the doctrine is embedded in what is now Art 4 of the Singapore Constitution.

In support of these propositions, it is now necessary to examine the history of how the Singapore Constitution came to be what it is today from the day Singapore ceased to be a British colony on 16 September 1963 to 1980 when the 1980 reprint was published as the first authentic text of the Singapore Constitution.

A. Short history of the Singapore Constitution and its basic structure

39 In its short history as an independent state, Singapore has had only two constitutions: first when the State of Singapore ("1963 State of Singapore") became a constituent state of Malaysia on 16 September 1963 ("Malaysia Day"); and second, when it separated from Malaysia on 9 August 1965 ("Singapore Day") as an independent and sovereign state. The first constitution, *viz*, the 1963 Singapore Constitution was granted by the UK government to enable it to join the Federation of Malaysia ("Malaysia"). Because the 1963 State of Singapore was part of Malaysia, the 1963 Singapore Constitution was subordinate to the Constitution of Malaysia of 1963 ("Malaysian Constitution", also known as "Federal Constitution") with respect to federal matters affecting Singapore.

40 Hence, on Malaysia Day, Singapore's Constitution had two components: (a) the 1963 Singapore Constitution and (b) those provisions of the Malaysian Constitution that were applicable to Singapore.

41 The Malaysian Constitution itself was an expanded version of the 1957 Malaya Constitution.[52] The 1957 Malaya Constitution was a

51 See paras 19–20 above.
52 See paras 32 and 34 above.

Westminster model constitution.[53] Hence, the Malaysian Constitution was also a Westminster model constitution. Similarly, the Constitutions of Sabah, Sarawak and Singapore were all based on the Westminster model constitution.

42 Singapore became an independent and sovereign state ("1965 State of Singapore") upon its separation from Malaysia (hence "Singapore Day") pursuant to three instruments, the: (a) Independence of Singapore Agreement 1965 ("Independence Agreement"); (b) Proclamation of Singapore; and (c) Singapore Amendment. The latter instrument was enacted by the Malaysian Parliament to grant independence and sovereignty to the 1963 State of Singapore which thereupon became the "1965 State of Singapore".[54] Section 7 of the Singapore Amendment continued in force in Singapore, *inter alia*, the 1963 Singapore Constitution which on Singapore Day became the constitution of the 1965 State of Singapore ("1963/1965 Singapore Constitution").[55]

43 Thus, on Singapore Day, Singapore's Constitution had two components: (a) the 1963/1965 Singapore Constitution; and (b) those provisions of the Malaysian Constitution which continued to apply in the 1965 State of Singapore, as provided in the Singapore Amendment.

44 In the four months between 9 August 1965 and 21 December 1965, the Legislature of Singapore did not enact any law for Singapore. But, on 22 December 1965, the Legislative Assembly passed two bills that became the (a) Constitution (Amendment) Act[56] ("CAA 1965") and (b) RSIA. The CAA 1965 was enacted on 22 December 1965, but the RSIA was enacted on 23 December 1965. Both Acts were enacted with retrospective effect on 9 August 1965.

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53 It was drafted by the Reid Constitutional Commission, whose five members were eminent judges and jurists from England, India and Pakistan. The alliance preferred a non-Malayan commission, largely because they felt that such a body would be able to avoid local prejudices and perform its task with complete impartiality. See Joseph M Fernando, *The Making of the Malayan Constitution* (Monograph, issue 31) (The Malaysian Branch of the Royal Asiatic Society, 2002) at p 103.

The marginal note of the supremacy clause read "Rule of law". See the annexure to the Report of the Federation of Malaya Constitutional Commission 1957.

54 The 1965 State of Singapore was renamed the "Republic of Singapore" by Constitution (Amendment) Act (Act 8 of 1965) on 22 December 1965.

55 Constitution of the Republic of Singapore 1965.

56 Act 8 of 1965.

45 In the interregnum between 23 December 1965 and 30 March 1979, Parliament (the new title of the Legislative Assembly) enacted 11 constitutional amendments.[57]

46 On 30 March 1979, Parliament passed the Constitution (Amendment) Act[58] of 1979 ("CAA 1979"), which came into force on 4 May 1979. Pursuant to CAA 1979, the attorney-general consolidated all the constitutional enacts from 1965 up to 1979 into one document, and published the 1980 reprint as the first authentic text of the Singapore Constitution.

B. The 1963 Singapore Constitution

47 The significance of the 1963 Singapore Constitution cannot be understated. The text of the 1963 Singapore Constitution was annexed to the Malaysia Agreement, under which the UK relinquished its sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore and vested it in Malaysia, "in accordance with this Agreement and the constitutional instruments annexed to this Agreement". The 1963 Singapore Constitution came into force in Singapore *immediately before* Malaysia Day under Art 94 of the Malaysian Constitution.[59]

48 The 1963 Singapore Constitution provided a complete framework for the Government of the 1963 State of Singapore. It provided, *inter alia*, a structure of government based on the separation of powers, consisting of: (a) Yang di-Pertuan Negara as the constitutional Head of State who must act in accordance with the advice of the Cabinet;[60] (b) an executive consisting of the Head of State and the Cabinet;[61] (c) the Legislature consisting of the Head of State and the Legislative Assembly;[62] and (d) a high court sitting in Singapore but which is part of the federal judiciary. The 1963 Singapore Constitution did not incorporate fundamental rights, but Part II ("Fundamental Liberties") of the Malaysian Constitution was applicable to Singapore. In short, the 1963 Singapore Constitution incorporated all the basic features of the Westminster model constitution.

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57 The enactments are Constitution (Amendment) Act (Act 7 of 1968); (Act 19 of 1969); (Act 13 of 1970); (Act 40 of 1970); (Act 16 of 1971); (Act 25 of 1972); (Act 37 of 1972); (Act 3 of 1973); (Act 5 of 1978); (Act 21 of 1978); (Act 10 of 1979). Except for Constitution (Amendment) Act (Act 10 of 1979), the other amendments are not relevant to this article's thesis.

58 Act 10 of 1979.

59 Article 94 of the Malaysian Federal Constitution reads: "this Constitution shall come into effect immediately before Malaysia Day".

60 Constitution of the State of Singapore 1963, Arts 1(1) and 5.

61 Constitution of the State of Singapore 1963, Art 7.

62 Constitution of the State of Singapore 1963, Art 22.

49 Article 42(1) of the 1963 Singapore Constitution provided that the power of the Legislature to make laws shall be exercised by Bills passed by the Legislative Assembly and assented to by the Yang di-Pertuan Negara. The matters on which the Legislative Assembly could enact laws were set out in List II ("State List") and List III ("Concurrent List"). There were 19 matters on List II and 20 matters in List III. The 1963 Singapore Constitution also empowered the Legislative Assembly to make laws as specified in its various Articles.

50 Furthermore, Article 52 of the 1963 Singapore Constitution provided for the supremacy of the 1963 Singapore Constitution in declaring: "[a]ny law enacted by the Legislature after the coming into operation of this Constitution which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void". Article 52 was crucial to the special status of the 1963 State of Singapore within Malaysia which was the sovereign state on interstate and federal matters. It is suggested that this supremacy clause was inserted to ensure that, within the territory of Singapore then, the Singapore Constitution was supreme in relation to matters specially reserved to Singapore under the Malaysia Agreement and the Malaysian Constitution.[63] In this connection, Art 161H of the Malaysian Constitution provided significant safeguards for the constitutional position for Singapore, which gave Singapore a significant measure of autonomy or state sovereignty *vis-à-vis* the federation.[64]

51 Article 90(1) of the 1963 Singapore Constitution provided that "the provisions of the Constitution may be amended by a law enacted by the Legislature" and Art 90(2) provided: "[a] Bill for making an amendment to this Constitution shall not be made unless it has been

63 See para 49 above.

64 Article 161H of the Federal Constitution of Malaysia of 1963 (1964 Reprint) read:

> No amendment shall be made to the [Federal] Constitution without the concurrence of the [Yang di-Pertuan Negara] if the amendment is such as to affect the operation of the Constitution in relation to Singapore as regards any of the following matters –
>
> (a) citizenship of Singapore, and the restrictions to the citizens of Singapore of the right to be a member of either House of Parliament for or from Singapore, or to be a member of the Legislative Assembly of Singapore, or to vote in any elections in Singapore;
>
> (b) the constitution and jurisdiction of the High Court in Singapore and the appointment, removal and suspension of judges of that court;
>
> (c) the matters with respect to which the Legislature of the State may make laws, the executive authority of the State in those matters, the borrowing powers of the State and the financial arrangements between the Federation and the State …

supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members thereof".

52 In summary, it is argued that the UK Parliament: (a) gave the 1963 State of Singapore a constitution that provided a basic structure of government based on the Westminster model constitution and which was supreme within the jurisdictional limits of Singapore,[65] and (b) restricted the power of the Malaysian Parliament from intruding into its protected state rights and powers directly, or indirectly, without Singapore's consent, by means of amending the Malaysian Constitution.

C. Singapore's independence documents

53 As mentioned earlier, Singapore's exit from Malaysia was unexpected. The terms of separation were negotiated hastily and in secret to avoid any potential roadblock. Former Prime Minister Lee Kuan Yew ("PM Lee") requested E W Barker, his then Minister for Law, to draft the necessary constitutional instruments for Malaysia to grant independence to Singapore. Barker was not a legislative draftsman or a constitutional law expert. To his credit, he did his own research and produced within a short time three draft documents, *viz*, the Independence Agreement, the Proclamation of Singapore and the Singapore Amendment, which the Malaysian government accepted. In these circumstances, the documents did not spell out in precise terms or in full all the consequences of separation. They were drafted solely with one objective: to provide Singapore's separation from Malaysia as an independent and sovereign state.

54 On Singapore Day, these three constitutional instruments came into effect, and the Malaysian State of Singapore became independent and sovereign, separate from Malaysia. A new legal order came into being in Singapore. The 1963 State of Singapore became defunct, but a new, 1965 State of Singapore was born. Thereafter, the Singapore government continued to govern Singapore under its existing laws, which included the 1963 Singapore Constitution and those provisions of the Malaysian Constitution that were still applicable in Singapore.

55 Singapore's exit from Malaysia was effected legally by the Singapore Amendment, a Malaysian act. It gave independence and sovereignty to Singapore. As such, it is the founding document of the

65 In principle, the issue of whether the basic structure doctrine is applicable to Singapore could, in theory, have arisen during this period 1963. Suppose, the Legislative Assembly had enacted a constitutional amendment to extend the parliamentary term of five years to 50 years, would that amendment have destroyed a basic feature of the Constitution of the State of Singapore 1963?

1965 State of Singapore (hereinafter, "1965 State/Republic of Singapore" as it was renamed later as "Republic of Singapore" by the RSIA) legally and historically.[66]

56 The material sections of the Singapore Amendment are:[67]

> 3. Singapore shall cease to be a State of Malaysia on the 9th day of August, 1965, (hereinafter called 'Singapore Day') and shall thereupon become an independent and sovereign state and nation separate from and independent of Malaysia and recognised as such by the Government of Malaysia; and accordingly the Constitution of Malaysia and the Malaysia Act shall thereupon cease to have effect in Singapore except as hereinafter provided.
>
> 4. The Government of Singapore shall on and after Singapore Day retain its executive authority and legislative powers to make laws with respect to those matters provided for in the Constitution.
>
> 5. The executive authority and legislative powers of the Parliament of Malaysia to make laws for any of its constituent States with respect to any of the matters enumerated in the Constitution shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Government of Singapore.
>
> 6. The Yang di-Pertuan Agong shall on Singapore Day cease to be the Supreme Head of Singapore and his sovereignty and jurisdiction, and power and authority, executive or otherwise in respect of Singapore shall be relinquished and shall vest in the Yang di-Pertuan Negara, the Head of State of Singapore.

66 In *Sng Hung Meng v Public Utilities Board* [1965–1967] SLR(R) 205 ("*Sng Hung Meng*"), the Federal Court of Malaysia sitting in Singapore, affirmed F A Chua J's decision that s 6 of the Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965) ("Singapore Amendment") had completely divested all sovereignty, jurisdiction, power and authority, executive or otherwise vested in the Yang di-Pertuan Agong of Malaysia in respect of Singapore, *ie*, the totality of all his powers, sovereign or otherwise in respect of Singapore, and vested them in the Yang di-Pertuan Negara of Singapore. Hence, a writ of summons must be issued in the name of the Yang di-Pertuan Negara, and not that of the Yang di-Pertuan Agong. Chua J had also held that consequent upon the passing of the Singapore Amendment, the High Court of Singapore in Malaysia became the High Court of Singapore, which was authorised by the Singapore Amendment to exercise the judicial power under the Malaysian Federal Constitution in Singapore. The decisions in *Sng Hung Meng* were concerned with the effect of s 6 of the Singapore Amendment. The meaning and effect of ss 4 and 5 of the Singapore Amendment was not in issue.

67 Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965) ss 3–8.

> 7. All present laws[68] in force in Singapore immediately before Singapore Day shall continue to have effect according to their tenor and shall be construed as if this Act had not been passed in respect of Singapore subject however to amendment or repeal by the Legislature of Singapore.
>
> 8. Until other provision is made by the Legislature of Singapore, the jurisdiction, original or appellate, and the practice and procedure of the High Court and the subordinate Courts of Singapore shall be the same as that exercised and followed immediately before Singapore Day, and appeals from the High Court shall continue to lie to the Federal Court of Appeal of Malaysia and then to the Privy Council in like manner.

57 The Singapore Amendment effected the following changes to the legal order of Singapore:

> (a) Singapore became an independent and sovereign state, separate from Malaysia.
>
> (b) The Malaysian Constitution ceased to have effect in Singapore except as therein provided. The fundamental liberties in Part II were not so provided, and accordingly ceased to apply to Singapore.
>
> (c) The Government of Singapore retained its executive authority and legislative powers to make laws with respect to those matters provided for in the Singapore Constitution, that is, in Lists II and III of the Ninth Schedule of the Malaysian Constitution. On or after Singapore Day, the Legislative Assembly continued to exercise these powers, but in the case of List III powers, its exercise was free from federal override.
>
> (d) The "executive authority and legislative powers of the Parliament of Malaysia to make laws for any of its constituent States with respect to any of the matters enumerated in the Constitution", that is, in List I, was transferred "so as to vest in the Government of Singapore".
>
> (e) The Yang di-Pertuan Agong ceased to be the Supreme Head of Singapore and his sovereignty and jurisdiction, and power and authority, executive or otherwise in respect of Singapore was relinquished and vested in the Yang di-Pertuan Negara, the Head of State of Singapore.

68 The expression "present laws" in s 7 of the Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965) does not include the Malaysian Constitution as it had ceased to apply to Singapore on Singapore Day under s 3, and therefore could not be a "present" law under s 7.

> (f) All "present laws" in force in Singapore on 8 August 1965 continued to have effect according to their tenor. Accordingly, the 1963 Singapore Constitution and all the existing state laws continued as part of the constitutional and legal regime of the 1965 State of Singapore.
>
> (g) The judicial system of Singapore under the Malaysian Constitution was to remain until other provision was made by the Legislature of Singapore.[69]

58 The Proclamation of Singapore was also read out to the people of Singapore in the morning of Singapore Day. It read:[70]

> Now I LEE KUAN YEW Prime Minister of Singapore, DO HEREBY PROCLAIM AND DECLARE on behalf of the people and the Government of Singapore that as from today the ninth day of August in the year one thousand nine hundred and sixty-five Singapore shall be forever a sovereign democratic and independent nation, founded upon the principles of liberty and justice and ever seeking the welfare and happiness of her people in a more just and equal society.

59 The proclamation envisaged a form of "democra[cy]" (that is, representative government and separation of powers) "principles of Justice and equality" (that is, fundamental rights). The critical words in the proclamation are "forever", "democratic nation", "principles of liberty and justice" and a more just and "equal society". Implicit in the 1963 Singapore Constitution, which was supreme, was the rule of law. This article thus argues that Singapore Amendment and the Proclamation of Singapore, read together, should be sufficient to constitute a "Harding" constitutional moment. On Singapore Day, there was a process whereby the intention of the constitution-makers could be determined. It cannot be doubted that PM Lee was the prime constitution-maker of the Singapore Constitution.

60 "Singapore was cast adrift in a friendless world, with the wreckage of a constitution designed for its existence as a state within a federation. That 1963 Singapore Constitution had obviously to be the basis for an independence constitution".[71] Hugh Hickling was correct in

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69 See para 55, n 66 above.

70 Proclamation of Singapore (9 August 1965) at p 2.

71 In R H Hickling, *Essays in Singapore Law* (Pelanduk Publications, 1992) at p 31, Hickling agreed with Andrew Harding that Art 4 of the Singapore Constitution invested the Constitution with its own unique authority. He was also of the view that the doctrine of constitutional supremacy has in both territories an uncertain foundation, and "this is a fact reflected in the manner in which the bench and Bar approached any constitutional issue": at p 39. If this is a reference to Harding's Grundnorm, at least in respect of Singapore, this article does not agree. The doctrine has a sure foundation in the 1963 Singapore Constitution. No Singapore

(*cont'd on the next page*)

this respect, but the 1963 Singapore Constitution was not a wreck. It survived completely intact because the Singapore Amendment provided for the continuation in force of "all present laws" in force in Singapore, including the 1963 Singapore Constitution. It thereupon, by sheer constitutional logic, became the constitution of the 1965 State of Singapore.

D. The Singapore Amendment and its constitutional status

61 One may see Harding's view that Singapore lacks a constitutional moment upon which to ground a basic structure doctrine as a continuation of his earlier work. In 1983, Harding published an article "Parliament and the Grundnorm in Singapore"[72] ("Grundnorm"), in which he argued that the Singapore Amendment was so defective as a constitutional enactment that it could not possibly claim to be a founding or fundamental document in Singapore's Constitution. Harding clearly did not mean that the Singapore Amendment was not the founding document of Singapore's independence, as it undoubtedly was. What he appeared to have in mind was that the Singapore Amendment was not *the source* of Singapore's Constitution because of its drafting defects, and went on to argue that, as a result, it was the RSIA that created "the real and original Constitution of Singapore".[73] As will be seen, Harding's dismissive view of the status of the Singapore Amendment was the first step in the formulation of his "shocking"[74] theory that the Singapore Constitution was not supreme, but that Parliament was.[75] But more later on this subject.

62 Harding's criticisms of the defects in the Singapore Amendment are set out in the passages reproduced below:[76]

> First, the legislative power was vested by the Singapore amendment in the Government of Singapore. *The intention and effect of this is not clear.* The Act clearly does not intend 'Government' to mean

court has doubted the Singapore Constitution was and is supreme. No advocate has ever made an argument in court on the basis that legislative supremacy operated in Singapore (unless legislative supremacy is taken to mean that Parliament could amend the Singapore Constitution with the requisite parliamentary majority. In any case, even Parliament has always passed legislation on the basis that the Singapore Constitution is supreme.

72 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351.

73 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 367.

74 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 352.

75 See para 84 below.

76 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 364–365.

'Legislature', because the latter term is used in its ordinary meaning to refer to the Legislative Assembly, in section 7. It might be natural to conclude that, odd though it may be, the intention of the Act is to vest the Legislative power in the executive. If so, section 7 makes little sense because it clearly envisages the exercise of legislative power by the Legislative Assembly. It may therefore be that the intention was to vest the legislative power in the executive as an interim, transitional measure, and that that power would be returned in due course to its proper place with the Legislative Assembly. Even this possibility does not however explain section 7, which does not allow for amendment or repeal of laws by the executive. *The result would be that the executive could make new laws but only the legislature could amend or repeal laws.*

Secondly, the executive power is vested by section 5 of the Singapore amendment in the Government of Singapore, but the executive power referred to is that of the Parliament of Malaysia. Such executive power did not in fact exist under the Federal Constitution, for the executive power was vested in the Yang di-Pertuan Agong and was exercisable primarily by the Cabinet. Section 6 however could be regarded as vesting the executive power in the Yang di-Pertuan Negara, thus enabling it to be exercised by the Cabinet in Singapore.

All in all this is indeed a remarkable constitutional regime which would seem incongruous even in the pages of *Alice in Wonderland*. It is certainly unworthy of the auspicious occasion of its enactment.

Thirdly, and fatally for the Singapore amendment's claim to the title of founding document of Singapore's Constitution, certain of its provisions are actually contradicted by the R.S.I.A. In particular section 5 of the R.S.I.A. corrects section 5 of the Singapore amendment by vesting the legislative powers of the Yang di-Pertuan Agong and the Parliament of Malaysia in the President and Parliament of Singapore; and section 6 of the R.S.I.A. contradicts section 3 of the Singapore amendment by applying numerous provisions of the Federal Constitution to Singapore.

Thus it seems clear that, quite apart from the obvious objections to certain provisions of the Singapore amendment simply as constitutional provisions, these defects in its claim to be the fundamental document in Singapore's Constitution mean that Singapore's jurisprudence just cannot afford to entertain such a claim. The constitutional regime has been established by the R.S.I.A.; if the Singapore amendment is prior to the R.S.I.A. in Singapore's legal system, then the chaos reigns – Parliament cannot legislate and the citizens of Singapore, contrary to their understanding, have never had the benefit of large portions of the Federal Constitution since 1965, at least if we believe section 3 of the Singapore amendment. The severing of the umbilical card, so salutary for the parent legal system, would be fatal for the infant legal system.

[emphasis added]

63 A close study of these passages reveals that Harding's strictures were directed primarily at s 5, which provided, "[t]he executive authority and legislative powers of the Parliament of Malaysia … shall be transferred so as to vest in the Government of Singapore". To Harding, these words made no legal sense, since (a) the Malaysian Parliament did not have executive authority, and (b) the legislative powers of the Malaysian Parliament were transferred to the "Government of Singapore", instead of to the Legislative Assembly. However, Harding accepted that s 6 could be read to have transferred the executive authority to the correct constitutional body, *viz*, the Yang di-Pertuan Negara. So, at least, that would resolve this apparent defect in s 5. Because there was no transfer of the legislative powers of the Malaysian Parliament to the Legislature of Singapore, the Legislative Assembly had no plenary legislative powers to legislate on the matters that were allocated to the Malaysian Parliament under List I of the Ninth Schedule of the Malaysian Constitution. This was a critical omission, since, to Harding, it meant that the Legislative Assembly had no plenary legislative powers, or powers to legislate on the matters set out in List I of the Ninth Schedule of the Malaysian Constitution which had disappeared into thin air.

64 In Grundnorm,[77] Harding commented: "[d]uring some four months a Government owing its authority to the old legal order has governed the country". Whilst this statement is technically not incorrect, the true position was that the Singapore Amendment, by granting independence to Singapore, had created a new legal order in Singapore and, by continuing in force the 1963 Singapore Constitution, made it the 1963/1965 Singapore Constitution. Hence, the Government's authority to govern Singapore was continued under the 1963/1965 Singapore Constitution.[78] The 1963 State of Singapore might have become defunct constitutionally and politically,[79] but the 1963 Singapore Constitution continued in force as the 1963/1965 Singapore Constitution of the 1965 State/Republic of Singapore. In Grundnorm, Harding completely ignored the relevance of the 1963 Singapore Constitution, and its status as the constitution of the 1965 State of Singapore (except when he argued that it was not supreme).

77 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 366.

78 See, *eg*, *The Constitution of Singapore (Responsibility of the Prime Minister) Notification 1965* (S 156), *The Constitution of Singapore (Responsibility of the Deputy Prime Minister) Notification 1965* (S 157) and eight other modifications (*viz*, S 158–165), all dated 8 October 1965.

79 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 367.

E. Meaning of "Government of Singapore" in ss 4 and 5 of the Singapore Amendment

65 This article holds a different view from Harding of the meaning and effect of s 5 of the Singapore Amendment. It was certainly not a model of clarity, but its purpose was clear. When read in the context of s 4 is read first, the drafter's intention was clear. Harding read the term "Government of Singapore" in s 5 to refer to the Executive, but that was not the meaning intended by the drafter. Here is the analysis:

(a) The ordinary meaning of "government" is a body of persons who govern the state or the community. When used in its capitalised form "the Government", it usually refers to the executive branch of government. But it does not have a fixed meaning. It is not a defined terms in Singapore Constitution or the Interpretation Act. Article 37(1) of the Singapore Constitution provides that the "Government" shall have power to acquire, and dispose of property of any kind and to make contracts. Article 37(2) provides that the Government may sue and be sued. The term "Government" (defined to mean the Government of Singapore) in Article 37 does not mean, but includes, the Executive.

(b) Similarly, the same expression is also used in the wider sense in the recital of the RSIA, which reads: "[a]n Act to make provision for the Government of Singapore consequent on her becoming an independent and sovereign republic separate from and independent of Malaysia". In the recital, the term refers to the entire apparatus of government, including the Legislature, the Executive and the Judiciary, as that was what the RSIA dealt with.

(c) Harding interpreted this term to mean the Executive, on the ground that the Act did not intend "Government" to mean "Legislature", because the latter term used in s 7 meant the "Legislative Assembly". The reasoning is that if the Government of Singapore did not mean the Legislature, it must therefore mean the Executive. In effect, Harding's interpretation was based on the process of elimination. Eliminate the "Legislature" from "Government of Singapore", one is left with "Executive". Harding's interpretational approach is contextually flawed because the two terms are used in two different sections enacted for different purposes. In the first context of s 5, the term "Government of Singapore" is used in the context of vesting the executive authority (of the Yang di-Pertuan Agong)[80] and

80 See para 66 above.

legislative powers of the Parliament of Malaysia in the Government of Singapore. In that context, the term does not necessarily or only mean the Executive. In the second context of s 7, the term "Legislature of Singapore" is used in the context of amending and repealing laws, and necessarily and only means the Legislative Assembly, and cannot possibly refer or include the "the Government" (meaning the Executive). Section 7 refers to the power of the Legislature to amend the laws that continued in operation after Singapore Day. In s 7, only one power is referred to. In s 5, two powers are used with reference to "Government of Singapore". Section 7 cannot be used to determine the intention of the draftsman in using the term "Government of Singapore" in s 5, which was concerned with the transfer by the paramount state of its executive and legislative powers to the subordinate state to whom it is granting independence. In other words, if "Legislature" does not mean "Government", it does not follow that "Government", can never include "Legislature". Indeed, Harding's approach implicitly recognised that the term "Government of Singapore" could include both the Executive and the Legislature, but for the use of the term "Legislature" in s 7.

(d) The term "Government of Singapore" is also used in s 4. In the context of s 4, the draftsman intended to use the term "Government of Singapore" to refer to both arms of government, that is, the Executive and the Legislature. Otherwise, s 4 would serve no purpose and would be useless legislation.[81] The Government of Singapore could not legally retain its executive authority and legislative powers to make laws with respect to those matters provided for in the Singapore Constitution, if it meant only the Executive. The draftsman would not have made such an egregious mistake as any first year student of constitutional law would know that the Legislature legislates and the Executive executes (the laws). Hence, in s 4, the draftsman must have used the term as a shorthand expression to refer to both arms of government. A court applying s 4 would simply read it purposively so as to vest them in the corresponding arms of government.[82]

81 In *Tan Cheng Bok v Attorney-General* [2017] SGCA 50, the Court of Appeal affirmed the rule of interpretation of a parliamentary text laid down in *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40] that Parliament is presumed not to have intended an unworkable or impractical result, so an interpretation that leads to such a result would not be regarded as a possible one.

82 According to Kevin Tan in Lam Peng Er & Kevin Y L Tan, *Lee's Lieutenants: Singapore's Old Guard* (Allen & Unwin, 2001) at p 87, Barker drafted the Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965) at

(*cont'd on the next page*)

> (e) The draftsman would have used the same term in s 5 to have the same meaning.
>
> (f) Accordingly, instead of interpreting the term "Government of Singapore" to make no sense of ss 4 and 5, the interpreter should give it a purposive meaning to make sense of it. The purpose of s 5 was to transfer the executive authority and the legislative powers of the paramount state to the subordinate state as part of the process of granting it independence. The term should be interpreted sensibly and generously to effect the purpose rather than to frustrate it. There would be no reason why the court would interpret s 4 to defeat its purpose and make nonsense of it.[83]

66 Harding's criticism that the "executive authority" in s 5 did not exist is also not sustainable. The term "executive authority" is not qualified by the words "of Parliament of Malaysia to make laws", and it should not be read as so qualified. The apparent absurdity could easily be avoided by reading the words "executive authority" as free-standing, which will make sense of it. The same collocation of words is also found in s 4, where it is clear that the term "executive authority" is free-standing, and not qualified by the words "of Parliament of Malaysia to make laws".

67 A purposive interpretation of ss 4 and 5 would clear up any ambiguity, contradiction or obscurity in the term "Government of Singapore" used therein. Everything would then fall into place.

68 For the above reasons, s 5, properly construed, did transfer and vest in the Legislative Assembly the legislative powers of the Malaysian Parliament under List I of the Malaysian Constitution. It follows that, contrary to Harding's thesis in Grundnorm, the Legislative Assembly had legislative power under the 1963/1965 Singapore Constitution to enact the RSIA.

69 Harding's interpretation of the term "Government of Singapore" in s 5 is pivotal to his theory of legislative supremacy. The linchpin of Harding's thesis is that Parliament (or rather, the Legislative Assembly) had no legislative power to enact the RSIA (those powers not having vested in the Legislature but in the Executive),[84] and therefore the Legislative Assembly could only have enacted the RSIA by

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the request of Prime Minister Lee Kuan Yew, who also approved it. So did Mrs Lee, and also the Malaysian attorney-general and the Malaysian ministers.

83 See para 65(d), n 81 above.

84 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 365.

self-proclaiming its own legislative supremacy to pass the RSIA. If his interpretation of s 5 is incorrect, then his theory falls to the ground.

F. Passing/enactment of RSIA on 22/23 December 1965

70 This is a convenient juncture to consider Harding's second step in formulating his thesis that in Singapore, "[t]he grundnorm is the supremacy of the legislature … Parliament in passing the R.S.I.A. assumed the mantle of supremacy in Singapore,"[85] and "[t]hus all the provisions which appear in the Reprint can be traced to the real and original Constitution of Singapore, the R.S.I.A.".[86]

71 On 13 December 1965, two constitutional bills were read for the first time in the Legislative Assembly – the Republic of Singapore Independence Bill[87] ("Bill 43/1965") and the Constitution Amendment Bill[88] ("Bill 44/1965"). Bill 43/1965 contained the following enactment words: "[b]e it enacted by the President with the advice and consent of the Parliament of Singapore, as follows". Bill 44/1965 contained the following enactment words: "[b]e it enacted by the Yang di-Pertuan Negara with the advice and consent of the Legislative Assembly of Singapore, as follows". The two Bills were passed by the Legislative Assembly on 22 December 1965, but Bill 44/1965 was passed first and became the CAA 1965, followed immediately by Bill 43/1965, which became the RSIA. This reversal of chronology was necessary because on 22 December 1965, the Head of State and the Legislature under the 1963/1965 Singapore Constitution were known as the Yang di-Pertuan Negara and the Legislative Assembly. Bill 43/1965 could not be passed until and unless Bill 44/1965 was passed first.

72 The CAA 1965 was a constitutional amendment act, as indicated by its title, and therefore required a two-thirds parliamentary majority to pass it under Art 90(2) of the 1963/1965 Singapore Constitution.[89] Article 90 expressly vested the Legislative Assembly with legislative power to amend "this Constitution" outside the purview of the Malaysian Constitution. This amending power, exclusive to the State of Singapore *vis-à-vis* the Federation, was not given by the Malaysian Constitution. This point must be borne in mind when considering

85 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 366.

86 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 367. It may be added that if Parliament were supreme, the whole discourse on whether there is a basic structure doctrine and whether it applies in Singapore is futile.

87 Bill 43 of 1965.

88 Bill 44 of 1965.

89 See para 55 above.

Harding's argument that Parliament passed/enacted the RSIA on the basis of a self-proclaimed legislative power outside the 1963 Singapore Constitution.

73 Bill 43/1965 was not described as a constitutional amendment bill. Hence, as argued by Harding, it did not amend or purport to amend the 1963/1965 Singapore Constitution, and did not require a two-thirds parliamentary majority. For this reason, Harding argued in Grundnorm that the RSIA was a constitution-making enactment, and not a constitution-amending enactment. If it had been the latter, the Legislative Assembly could not have passed it unless it had plenary powers to do so, and it did not have such powers because s 5 of the Singapore Amendment had not vested the plenary powers of the Malaysian Parliament in the Legislative Assembly.[90] Harding's argument is as follows:[91]

> *The legislative powers granted by the 1963 Constitution were circumscribed by the Federal Constitution, so that the Singapore legislature had no capacity under the 1963 Constitution to exercise plenary powers; still less had it the power to grant itself plenary powers.* The 1963 Constitution referred in Article 42(1) to 'The power of the legislature to make laws,' from which it seems clear that the 1963 Constitution itself conferred no legislative power: that was done exclusively by the Federal Constitution with its elaborate provision for federal and state legislative competence. *Thus Parliament in passing the R.S.I.A. would have been acting under the 1963 Constitution only if that Constitution already conferred on Parliament plenary powers. It seems clear that it did not.* Even if it had, one could only regard this metamorphosis as having been the result of the Singapore amendment, in which case this second view is no different to the first view. *In fact the Singapore amendment made no mention of the 1963 Constitution and vested the legislative power in the Government, not the legislature; furthermore if Parliament already had the powers conferred by the R.S.I.A., most of the R.S.I.A. was unnecessary. As a parting shot, it should be noted that the R.S.I.A. itself at no point even purports to be an amendment to the 1963 Constitution. The Prime Minister's caution was indeed abundant, and the narrow achievement of a two-thirds majority for the R.S.I.A. need have occasioned no perspiration on his brow. The argument he feared was put out of court not by the special majority obtained but by sheer constitutional logic.*[92] [emphasis added]

90 See para 62 above.

91 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 365.

92 Andrew Harding's comment in the last sentence was a reference to the exchange of views between Prime Minister Lee Kuan Yew and the speaker when moving the bills to enact the Constitution (Amendment) Act (Act 8 of 1965) and the Republic of Singapore Independence Act (Act 9 of 1965) ("RSIA"). Harding meant that PM Lee did not have to worry because as the RSIA was not passed under the

(*cont'd on the next page*)

74 This article questions the correctness of the italicised statements in Harding's argument for the following reasons:

(a) First, not all the legislative powers granted by the 1963 Singapore Constitution were circumscribed by the Malaysian Constitution. Article 90 of the 1963 Singapore Constitution is an example. Under Art 90, the Legislative Assembly had power to amend "this Constitution". This power was granted by the 1963 Singapore Constitution and was not subject to the Malaysian Constitution. Therefore, irrespective of whether the Legislative Assembly had plenary powers or not on or after Singapore Day, it had an independent amending power in Art 90.

(b) Second, since the word "amendment" includes "addition", the Legislative Assembly by enacting the RSIA to add the provisions of the Malaysian Constitution by incorporating them into the 1963 Singapore Constitution was doing precisely what it was empowered to do under Art 90. When PM Lee moved the bill at its second and third readings to enact the RSIA, he requested a two-thirds majority vote, contrary to the

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Constitution of the Republic of Singapore 1965, but by Parliament wearing its self-made mantle of legislative supremacy.

The views of PM Lee and the speaker in *Singapore Parliamentary Debates, Official Report* (22 December 1965), vol 24 at cols 452–453 (Mr Lee Kuan Yew, Prime Minister and Mr A P Rajah, Speaker of Parliament) are reproduced below:

> [PM Lee]: Mr Speaker, Sir, on the question of the Constitutional procedure, again it will require a two-thirds majority on Second Reading.
>
> Mr Speaker: Mr Prime Minister, the only obligation on me is to see that I have a two-thirds majority on the Singapore Constitution Bill, but no such obligation is put on the Assembly with regard to the Federal Constitution. If the House, however, feels that it would be safer this way, I have no objection, but I felt that there was no obligation on this House to provide a two-thirds majority of any amendment to a matter outside the Constitution of the State of Singapore.
>
> [PM Lee]: *Ex abundante cautela*, I would urge that the House take a division after the Committee stage and on the Third Reading, the reason being as follows. Mr Speaker, Sir, I think a strict interpretation of the responsibilities as set out in the State of Singapore Constitution Act refers to amendments to the Singapore Constitution. But it is open to anyone to urge upon the Judiciary that the passage of this Bill, in fact, does make a fundamental alteration to the nature of the Singapore Constitution enactment, for it incorporates into that enactment all the Federal powers which were, whilst we were in Malaysia, part of the Federal Constitution. So that there can be no doubts about this matter, I would urge that the Bill be passed by a two-thirds majority and that a vote be taken.
>
> Mr Speaker: I entirely agree with Mr Prime Minister that this would be the safer course, of course, and we will take it. If there is going to be any argument about it, this will put it out of court completely …
>
> [emphasis added]

Speaker's opinion that only a simple majority was needed, for the reasons that the bill "does make a fundamental alteration to the nature of the Singapore Constitution enactment, for it incorporates into that enactment all the Federal powers which were, whilst we were in Malaysia, part of the Federal Constitution".[93] The incorporation of new provisions into the 1963 Singapore Constitution would have the effect of amending it. Therefore, the RSIA was, in substance, a constitutional amendment, although it did not recite as such (unlike the CAA 1965). It is therefore argued that the RSIA, contrary to Harding's argument, was indeed passed by the Legislative Assembly pursuant to its amending power under Art 90 of the 1963/1965 Singapore Constitution.

(c) Third, the Legislative Assembly had the capacity to exercise plenary powers because s 5 of the Singapore Amendment, on a purposive interpretation, had vested the plenary legislative powers of the Malaysian Parliament in the Legislative Assembly.[94] Accordingly, Parliament passed the RSIA under Art 42(1) of the 1963 Singapore Constitution.

(d) Fourth, and in any event, Parliament had plenary legislative powers on Singapore Day, as an attribute of Singapore's sovereignty, as affirmed by the Court of Appeal in *Taw Cheng Kong v Public Prosecutor*[95] ("*Taw Cheng Kong*"). Harding interpreted this decision as the Legislative Assembly exercising constituent power, but even so, the Legislative

93 *Singapore Parliamentary Debates, Official Report* (22 August 1965), vol 24 at cols 453 (Mr Lee Kuan Yew, Prime Minister).

94 See para 65 above.

95 [1998] 2 SLR(R) 489. In this case, the issue of Parliament's power to enact the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) was challenged by Taw, a Singapore citizen, who had been charged for a corrupt act committed in Malaysia whilst in the employment of the Government of Singapore Investment Corporation Pte Ltd. This power was originally vested in the Malaysian Parliament in Part VI under Art 73(a) of the Malaysian Federal Constitution (Reprint, as at 1 November 2010) with respect to the states. However, s 6(3) of the Republic of Singapore Independence Act (Act 9 of 1965) provided that Part VI would cease to have effect in Singapore on Singapore Day. Taw argued successfully before the High Court that the Singapore Parliament did not have power to legislate extraterritorially. The Court of Appeal held otherwise, and said at [32]:

> [W]here did Parliament obtain its power to enact the Constitution of Singapore (Amendment) Act and the RSIA? The only possible answer, it appeared, was in its exercise of its plenary legislative powers as the Legislature of an independent and sovereign state (s 5 of the [Constitution and Malaysia (Singapore Amendment) Act, 1965 (Act 53 of 1965)] having failed to do so … Thus, it was the political fact of Singapore's independence and sovereignty that had the consequence of vesting the Legislative Assembly of Singapore with plenary powers on Singapore Day.

Assembly would be exercising such power as the Legislature established by the 1963/1965 Singapore Constitution, which was supreme. It was not necessary for Legislative Assembly to assume, and it did not and did not purport to assume, a self-proclaimed legislative supremacy in enacting the RSIA. The source of the plenary powers of the Legislative Assembly was the Singapore Amendment, which was the source of Singapore's independence and sovereignty.

(e) Fifth, although the Singapore Amendment did not mention the 1963 Singapore Constitution by name, s 7 thereof provided for its continuation in force as the constitution of the 1965 State/Republic of Singapore on and after Singapore Day. Indeed, it was not even necessary for the Singapore Amendment to continue in force the 1963 Singapore Constitution. By constitutional logic, the 1963 Singapore Constitution had evolved into or succeeded as the constitution of the 1965 State of Singapore on Singapore Day.

(f) Sixth, although Bill 43/1965 did not recite that it was a constitutional amendment Bill, it was substantively intended to be such, and was passed by the Legislative Assembly in exercise of its powers under Art 90 of the 1963 Singapore Constitution. The CAA 1965 and the RSIA were enacted pursuant to the same source of legislative power, as is evident from the fact that Bill 43/1965 was passed a few minutes immediately after the passing of Bill 44/1965.

75 The deliberate omission to recite Bill 43/1965 as a constitutional amendment act deserves some additional observations. First, it might well be that the Singapore government (the Executive, including the attorney-general) had doubts about whether the Singapore Amendment had achieved its legislative purposes, or even shared Harding's view that it was so defective that it did not achieve its legislative purposes. Second, it could also be that the Singapore government, having become an independent and sovereign state, decided to follow the example of India (which followed the example of the Republic of Ireland) in asserting constitutional autochthony. The Indian Parliament did it by enacting Art 395 of the Indian Constitution to repeal the UK Indian Independence Act 1947[96] (which, it has been pointed out, the Constituent Assembly had no power to do). The Singapore Parliament did this by enacting the RSIA in the form it did, in exercise of its legislative powers under the 1963/1965 Singapore Constitution, or its plenary powers as the Legislature of a sovereign state (as decided in *Taw Cheng Kong*), and not by lifting its boots by its bootstraps. Once the

96 c 30.

1963 Singapore Constitution became the Constitution of the 1965 State of Singapore, the Legislative Assembly was free to enact any legislation it thought fit provided that it was not inconsistent with the 1963 Singapore Constitution.

76 The RSIA was enacted to tie up the loose ends that were left unattended to by the hastily drafted Singapore Amendment. It was drafted as a free-standing act and not as a constitutional amendment act for reasons which have not been articulated. The truth may yet surface in the future in the papers of the attorney-general or in the cabinet papers. But for constitutional law scholars, if the RSIA deserves respect, it is submitted that it would not be because it was Singapore's "real and original Constitution" or it shifted Singapore's *grundnorm* to legislative supremacy, as argued by Harding,[97] but because of its constructive ambiguity.

G. RSIA and legislative supremacy

77 We now take a closer look at the RSIA. The material sections are as follows:

> **3.** The Yang di-Pertuan Agong of Malaysia shall … cease to be the Supreme Head of Singapore and his sovereignty and jurisdiction and power and authority, executive or otherwise … shall be relinquished and vested in the Head of State.
>
> **4.** The executive authority of Singapore shall … be vested in the Head of State and shall be exercisable by him or by the Cabinet or by any Minister authorised by the Cabinet.
>
> **5.** The legislative powers of the Yang di-Pertuan Agong and the Parliament of Malaysia shall … cease to extend to Singapore and shall be transferred so as to vest in the Head of State and in the Legislature of Singapore respectively.
>
> …
>
> **6.**—(1) The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as might be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysian.
>
> (2) The provisions of the Constitution of Malaysia referred to in subsection (1) might in their application to Singapore to be amended by the Legislature.

97 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 367.

> (3) The following provisions of the Constitution of Malaysia shall cease to have effect in Singapore: —
>
> Part I; Article 13; Articles 14 to 18; Article 19A; Article 22; Articles 28 and 28A; Articles 30, 30A and 30B; Part IV; Part V; Part VI; Part VII; Part VIII; Articles 133 and 134; Article 139; Articles 141 to 143; Articles 146A to 148; Part XII; Part XIII; Part XIV; The Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteenth Schedules …
>
> …
>
> **11.** Until other provision is made by the Legislature, the jurisdiction, original or appellate, and the practice and procedure of the High Court and the subordinate courts of Singapore shall be the same as that exercised and followed immediately before Singapore Day, and appeals from the High Court shall continue to lie to the Federal Court of Malaysia and to the Privy Council. [references omitted]
>
> …
>
> **13.**—(1) Subject to this section, all existing laws would continue in force on and after Singapore Day, but all such laws would be construed as from Singapore Day with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act and with the independent status of Singapore upon separation from Malaysia.

78 It can be seen from the above provisions that the RSIA re-enacted in substance many of the provisions of the Singapore Amendment.[98] As "enacted", the RSIA was the legislative act of the Parliament of Singapore, but the historical fact is that it was first passed by the Legislative Assembly of the 1965 State of Singapore. The legal fact of the RSIA having retrospective effect to 9 August 1965 would not change the historical and legal fact that Singapore had already been independent and sovereign for more than four months before the RSIA was passed. The Singapore Amendment was a Malaysian act, and therefore could not be legally repealed by the Singapore Parliament.[99] So what the draftsman did was to ignore the Singapore Amendment.

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98 The Explanatory Statement to the Republic of Singapore Independence Bill (Bill 43 of 1965) reads: "[t]his Bill is designed to enable the Singapore Government and Legislature to take over the executive and legislative powers in Singapore consequent on the independence of Singapore and its ceasing to be part of Malaysia". The explanation does not explain from whom the Singapore government and the Legislature would be taking over the executive and legislative powers.

99 In his Second and Third Reading speech on the Republic of Singapore Independence Bill (Bill 43 of 1965), PM Lee Kuan Yew said: "it is possible by the end of next year … to bring into one complete document the Constitution which is now in four Parts … *the Amendments to the Federation of Malaysia Constitution by*

(*cont'd on the next page*)

79 Leaving these observations aside, the following provisions of the RSIA would not have changed the constitutional and legal status of Singapore if they had not been enacted, such as: (a) s 3 (cessation of the Yang di-Pertuan Agong of Malaysia as the Supreme Head of Singapore, *etc*); (b) ss 4 and 5 (if the present author's interpretation of the term "Government of Singapore" were accepted; (c) s 6(1); and (d) ss 11 and 13(1).

80 Section 6(1) refines s 7 of the Singapore Amendment. But it muddles the constitutional position by providing: "[t]he provisions of the Constitution of Malaysia … continue in force in Singapore". What does the word "continue" mean or imply? If those provisions were not in force in Singapore on and after 9 August 1965, they could not be "continued". If they were already in force, there was no need to continue them. Similarly, s 6(3) is not meaningful unless those provisions were in force in Singapore on and after 9 August 1965.

81 The most significant provisions of the Malaysian Constitution that were "continued" under s 6(1) are the fundamental liberties in Arts 5 to 12 thereof. But, again, there was no question of "continuing" them because their application to Singapore was discontinued by s 3 of the Singapore Amendment. Perhaps, this drafting was deliberate so that it could be read to cover both situations. Legislative drafting need not be elegant, or even precise, so long as it achieves its legislative purpose.

82 Another argument why the RSIA was not a constitution-making act is that it could not, *on the basis of its own provisions*, function or operate as the constitution of Singapore. The entire apparatus of government, including the structure of the Singapore government (in its largest sense) was embedded in the 1963 Singapore Constitution. The RSIA did not provide a framework or structure or provisions for a new constitution. What it did, *inter alia*, was to continue in force the 1963 Singapore Constitution as an existing law under s 13(1). Therefore, chronologically, and logically, the RSIA could not be the "real and original constitution of Singapore", if the 1963 Singapore Constitution was already the constitution of the 1965 State/Republic of Singapore for more than four months before the RSIA was passed or enacted.

83 How did Harding's reasoning get past this historical and legal fact to argue that the only the Kelsenian *grundnorm* could explain the constitutional status of the RSIA that it was a manifestation of

this Republic of Singapore Act" [emphasis added]. The Legislative Assembly had no power to amend the Malaysian Federal Constitution. What he meant was that in so far as the provisions of the Malaysian Constitution became and remained as part of Singapore law after Singapore Day, the Legislative Assembly had the power to amend them.

legislative supremacy, and that Parliament (or, actually, the Legislative Assembly) enacted the RSIA in the exercise of its supremacy? He argued as follows:[100]

> The R.S.I.A. purports to have been enacted by the President with the advice and consent of the Parliament of Singapore. It will be recalled that the titles 'President' and 'Parliament' were substituted by the Constitution (Amendment) Act 1965 for 'Yang di-Pertuan Negara' and 'Legislative Assembly'. If the R.S.I.A. is a fundamental document, then it is logically anterior (if chronologically posterior) to the Constitution (Amendment) Act 1965 (both, fortunately, were retrospective to 9th August 1965). *Thus the R.S.I.A. was indeed enacted by the (self-proclaimed, but why not?) President and Parliament of Singapore and not by the Yang di-Pertuan Negara and the Legislative Assembly of the (by then) defunct State of Singapore.*
>
> On this analysis the curious jigsaw puzzle of Singapore's Constitution begins to make sense. *The 1963 Constitution derives its authority from section 13(1) of the R.S.I.A. as 'existing laws' within the meaning of that section, and similarly all subsequent amendments thereto and all modifications which appear in the Reprint (subject to what was said earlier in this regard). The Malaysian provisions derive their authority from section 6(1) of the R.S.I.A., and similarly all subsequent amendments thereto. Thus all the provisions which appear in the Reprint can be traced to the real and original Constitution of Singapore, the R.S.I.A.*
>
> The significance of this analysis of the Constitution now be seen. *Parliament enacted the R.S.I.A. in the exercise of its supremacy. No other explanation of the R.S.I.A. fits the historical and legal facts*. If Parliament enacted a constitution by the R.S.I.A., it can quite clearly enact another Constitution by another Act. The R.S.I.A., while fundamental, is not, in a regime of legislative supremacy, beyond the reach of a legislative majority. Thus the accepted notion of constitutional supremacy as the guiding principle in Singapore's Constitution is an illusion which rests on a fundamental misunderstanding of Singapore's constitutional history.
>
> [emphasis added]

84 This article has the following comments on these passages:

(a) The statement that the RSIA was enacted by "self-proclaimed" President and Parliament and not by the Yang di-Pertuan Negara and the Legislative Assembly (by then) of the defunct State of Singapore was legally and historically incorrect. The titles of "President" and "Parliament" were changed from "Yang di-Pertuan Negara" and "Legislative Assembly" by the

100 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 367.

CAA 1965. The RSIA was enacted as Act 9 of 1965. The parliamentary record shows that the RSIA and the CAA were introduced as Bill 43/1965 and Bill 44/1965 respectively. But Bill 43/1965 was *passed* on 22 December 1965 *immediately after* Bill 44/1965 had been passed. The CAA received the assent of the Yang di-Pertuan Negara on 22 December, but the RSIA received the assent of the President on December 1965 after the title change. The CAA 1965 did not create a new office of "President" or a new legislature called "Parliament". The legislative fact is that the RSIA was *passed* by the Legislative Assembly on 22 December 1965, and was assented to on 23 December 1965. The President's assent given on 23 December 1965 was merely a formal act. Parliament could not have legally enacted the RSIA since it did not pass it. Harding appears to have recognised this error and has since corrected it in Basic Structure.[101]

(b) On this basis, the RSIA was not a fundamental document, nor was it enacted by a self-proclaimed President and Parliament, but a renamed Legislative Assembly. It was just another constitutional statute. The RSIA was chronologically posterior to the CAA 1965. No amount of reasoning or logic could make the RSIA anterior to it (as argued by Harding). Also, the 1963 Singapore Constitution did not derive, and could not have derived, its authority from the RSIA which, itself, was enacted almost two years later. It is suggested that Harding's novel explanation of the constitutional basis of the RSIA was based on a misinterpretation of the meaning and effect of the relevant provisions of the Singapore Amendment.[102]

(c) The thesis in Grundnorm rests on a single argument – the Singapore Amendment did not vest the legislative powers of the Malaysian Parliament in the Legislative Assembly. For that reason, to have the legislative power to pass Bill 43/1965, the RSIA, the Legislative Assembly (or Parliament) had to put on a self-made mantle of supremacy to enact the RSIA. This article takes the view that Harding's argument is based on a wrong interpretation of s 5 of the Singapore Amendment. Even if his interpretation is correct, the decision of the Court of Appeal in *Taw Cheng Kong* confirms its irrelevance because the possession of plenary legislative powers of the Legislative Assembly is an attribute of a sovereign state.

101 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) ch 2, at p 41.

102 See para 62 above.

(d) It is submitted that Harding's thesis is unsound and erroneous. Even the members of the Legislative Assembly would have been shocked if they had been told that one minute after passing Bill 44/1965 pursuant to their powers under the 1963/1965 Singapore Constitution, and the next minute they would no longer have such power, but would have to assume supreme legislative powers in order to pass Bill 43/1965.[103]

H. Attorney-General and the 1980 reprint

85 Based on his thesis of legislative supremacy as the Singapore grundnorm, Harding argued that the declaration of supremacy in Art 4 of the 1980 reprint had no legal basis, as follows:[104]

> The words 'this Constitution is the Supreme Law of the Republic of Singapore and …' were added by the Attorney-General for the purposes of the Reprint. Since Article 52 referred to the Constitution of a state of a federation, which is all the 1963 Constitution ever was or was intended to be, that provision is not evidence that that Constitution was supreme law; in fact of course the Federal Constitution was supreme law, and any law enacted by the legislature of Singapore contrary to the Federal Constitution, even if expressed as an amendment of the 1963 Constitution, would be void. Article 52 merely provided a further restriction of the already restricted powers of the Legislative Assembly. Thus the supremacy clause, qua supremacy clause, has only been part of the text of the Constitution since 31st March 1980, when the Reprint became operative. The theory of constitutional supremacy therefore requires us to believe either that on 31st March 1980 the Constitution mysteriously became supreme law (this I submit is so incredible that it requires no further discussion – I doubt if the learned Attorney-General would wish to claim that by a mere stroke of the pen he had rendered the Constitution supreme law as from as from 31st March 1980, or that the present Article 4 merely states what was already so. Thus Article 4 adds nothing to the argument: it is either a correct or an incorrect description of the status of the Constitution. In view of the arguments put forward here and all the constitutional developments prior to 9th August 1965 the Constitution can only be supreme law if there was something about the constitutional facts of separation which made it supreme law.

86 Harding gave no reason for arguing that Art 52 did not mean what it plainly stated, except that it was not evidence that that

103 Occam's razor teaches us that the simplest explanation for an event or occurrence is usually the best explanation.

104 Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 *Malaya Law Review* 351 at 357.

constitution was supreme, which explained little if anything, since he did not explain what it could be evidence of.

87 This article holds the view that Art 52 meant what it plainly stated, that "this Constitution" is supreme. Other reasons in support of this interpretation are as follows:

(a) Article 52 was an integral part of the 1963 Singapore Constitution that was a gift of the UK government to the State of Singapore to enable it to join Malaysia. It came into operation immediately *before* Malaysia Day. Thus, the 1963 State of Singapore had a constitution that was supreme *even before* it became a Malaysian state. On Malaysia Day, it continued as the supreme law of the 1963 State of Singapore.

(b) Article 52 affected only state laws passed by the Legislative Assembly, and not federal laws which were subject to the supremacy clause in Art 4 of the Malaysian Constitution. Article 4 of the Malaysian Constitution and Art 52 of the 1963 Singapore Constitution operated within their respective spheres of jurisdiction and power. They were mutually exclusive. There was no contradiction between federal supremacy and state supremacy.

(c) The Legislative Assembly had legislative power to legislate on matters specifically set out in the 1963 Singapore Constitution[105] and also on those matters set out in Lists II and III of the Ninth Schedule of the Malaysian Constitution. The 1963 Singapore Constitution was supreme within the State of Singapore with respect to those matters on which the Legislature had the power to legislate. The Legislative Assembly could not enact any law that was inconsistent with, say, Part II ("The Legislature") or Part III ("Citizenship") of the 1963 Singapore Constitution.

(d) On Singapore Day, the 1963 Singapore Constitution succeeded constitutionally as the constitution of the 1963 State of Singapore or 1965 State/Republic of Singapore.

88 Harding's view that the declaration of supremacy in Art 4 of the Singapore Constitution was improperly added by the attorney-general was based on the erroneous view that the 1963 Singapore Constitution was not supreme within Singapore, and that it had not succeeded as the constitution of the 1965 State/Republic of Singapore and continued as the supreme law of the Republic of Singapore. The issue of whether the

105 See, *eg*, Constitution of the State of Singapore 1963, Arts 4, 6(2), 7(2), 47, 51, 81, 87 and 90(1).

Singapore Constitution (to be published as the 1980 reprint as the authentic text of the Singapore Constitution) was supreme would have been unquestionably of the greatest constitutional import to Singapore. Hence, one would not expect the attorney-general to be so audacious as to decide this issue on his own authority, of which he must have known he had none. He did not, because of s 8(1) of the CAA 1979, which repealed and substituted Art 93(1) with the following:

> The Attorney-General may, with the authority of the President, as soon as may be after the commencement of the Constitution (Amendment) Act, 1979, cause to be printed and published a consolidated reprint of the Constitution of Singapore, as amended from time to time, amalgamated with such of the provisions of the Constitution of Malaysia as are applicable to Singapore, into a single, composite document to be known as the 'Reprint of the Constitution of the Republic of Singapore, 1979'.

The attorney-general published the 1980 reprint in conformity with the requirements of this section. He would have obtained the authority of the President who would have acted on the advice of the Cabinet or a minister exercising the authority of the Cabinet.[106]

89 Furthermore, Art 52, on its own terms, was a supremacy clause that was part of the 1963 Singapore Constitution which had been continued in force in the 1965 State of Singapore by the Singapore Amendment, or by the political fact of Singapore being an independent and sovereign state. Article 52 was therefore not a self-proclamation. The 1963 Singapore Constitution was a gift from the UK Parliament to the State of Singapore immediately before Malaysia Day, and continued as the constitution of the Republic of Singapore. The insertion of the supremacy declaration in Art 4 merely affirmed what was already the effect of Art 52.

106 After the Constitution (Amendment) Act (Act 8 of 1965) ("CAA") was enacted, the Attorney General's Chambers published an unofficial reprint of the Constitution of the Republic of Singapore dated 25 March 1966, which took into account the provisions in the CAA 1965 and the Modification of Law (Constitution of Singapore) Order 1966 (No 5 of 1966). This reprint reproduced the Constitution of the State of Singapore 1963 as amended by the CAA 1965, including Art 94, which provided: "[s]ubject to the provisions of Part VII of this Constitution [Temporary and Transitional provisions] this Constitution shall come into operation immediately before the 16th day of September 1966". The 1966 Reprint supports this article's thesis that the 1963 State Constitution of Singapore automatically became the Constitution of the 1965 State of Singapore (later renamed, "Republic of Singapore") Constitution, and also contradicts Harding's argument that the Republic of Singapore Independence Act (Act 9 of 1965) was the real and original Constitution of Singapore.

I. Article 4 of the Singapore Constitution and basic structure doctrine

90 We now consider an alternative thesis of this article – the rationale of the basic structure doctrine is embedded in the Singapore Constitution. Articles 4 and 5 provide:

> **4.** This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> …
>
> **5.**—(1) Subject to this Article and Article 8, the provisions of this Constitution may be amended by a law enacted by the Legislature.

91 Article 4 does not say that any law which is inconsistent with *a provision* of the Singapore Constitution is void, but that any law *which is inconsistent with this Singapore Constitution* is void. A provision of the constitution therefore may be amended in accordance with Art 5, but Art 4 says that no law enacted by the Legislature may be inconsistent with this Constitution. A constitutional amendment is a "law" under Art 4.[107] Hence, by definition, a constitutional amendment which is inconsistent with this Constitution shall be void, to the extent of its inconsistency. Article 4 must accordingly imply that the Singapore Constitution has a basic or fundamental structure that cannot be amended by a constitutional amendment. Otherwise, no such amendment can be inconsistent with "this Constitution".[108] This argument does not mean that all the provisions of the Singapore Constitution are part of the basic structure. Many provisions are not part of the fundamental structure of the Constitution, but ancillary provisions. Such provisions can be amended or repealed without

107 Thomson CJ in *The Government Of The State Of Kelantan v The Government Of The Federation Of Malaya And Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 at 359; *Ong Ah Chuan v Public Prosecutor* [1980–1981] SLR 48 at 670, and *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 at [59].

108 Article 2(9) of the Constitution of the Republic of Singapore (1999 Reprint) provides that the Interpretation Act (Cap 1, 2002 Rev Ed) shall apply for the purpose of interpreting the Singapore Constitution. In *Tan Cheng Bok v Attorney-General* [2017] SGCA 50, the Court of Appeal observed that in applying the purposive interpretation, a distinction should be made between a general purpose underlying the statute as a whole and the specific purpose underlying a particular provision. Section 9A is ambiguous as it refers to both the purpose underlying the "written law" (in s 9A(1) of the Interpretation Act) and to that underlying the "provision of the written law (in s 9A(2)–(3))". The court's observations are pertinent to the interpretation of the general purpose in Art 4 of the Singapore Constitution (which refers to "this Constitution") and the specific purpose in Art 5 (which refers to "the provisions of this Constitution").

affecting the basic structure. But, some provisions are part of the basic structure, and any amendment thereof could be inconsistent with Art 4. For example, Harding's extreme event would be inconsistent with the Singapore Constitution, if the judicial power is part of its basic structure. Similarly, repealing and substituting Art 4 with legislative supremacy would also be inconsistent with the Singapore Constitution if constitutional supremacy is a basic feature of the Singapore Constitution.

92 Is there any constitutional principle that prevents Art 4 from being so interpreted by the courts? This article suggests "no". There is no countervailing reason why the court should not so construe it so as to "preserve, protect and defend" the integrity of the Singapore Constitution or its basic structure. Constitutional supremacy is inconsistent with parliamentary supremacy. If the supremacy of the Singapore Constitution or its basic structure could be destroyed or eviscerated by a valid constitutional amendment of any of it provisions, then the notion of constitutional supremacy is meaningless, because Parliament is effectively supreme. It was not for nothing that the constitution-maker of the Singapore Constitution deliberately enacted Art 52 of the 1963 Singapore Constitution upon Singapore ceasing to be a colony and becoming a new state within Malaysia on 16 September 1963.[109]

93 Article 4, so construed, makes it unnecessary for Singapore courts to consider whether the basic structure doctrine is applicable in Singapore.

IV. Summary of conclusions

94 In summary, this article argues as follows:

(a) Contrary to Harding's thesis in Grundnorm, the Singapore Constitution is supreme, not Parliament, and that the RSIA is not the real and original constitution of the Republic of Singapore.

109 In Andrew Harding, *Law, Government and the Constitution in Malaysia* (Kluwer Law International, 1996) at p 53, Harding wrote:

> Moreover, principles apart, there is utility in preserving the most fundamental features of the Constitution from amendment when amendment has become such a frequent occurrence, and there is in fact a real danger that the basic structure of the Constitution may be amended out of existence. Indeed, it might be argued persuasively that this has already occurred, and precisely because there is no restriction on the power of constitutional amendment.

In this passage, Harding was arguing for the basic structure doctrine.

(b) The Singapore Constitution has a basic structure as implied by Art 4.

(c) Article 4 renders void any constitutional amendment enacted under Art 5 which destroys the Singapore Constitution or any of its basic features.

(d) Subject to (c), the basic structure doctrine is applicable in Singapore. If a constitutional moment is necessary for the basic structure doctrine to apply, there was such a moment on Singapore Day.

(e) The Singapore Constitution or its basic structure may be amended by a referendum.
